SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 398

UNITED STATES OF AMERICA, PETITIONER,

vs.

STATE OF ALABAMA, ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, *Defendants*

Complaint—Filed February 5, 1959

The United States of America, Plaintiff, brings this suit against the Board of Registrars of Macon County, Alabama (hereinafter referred to as the "Registration Board"), and against Grady Rogers and E. P. Livingston, members thereof, and alleges that:

1. This action is brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) to obtain preventive relief against acts and practices by the Defendants which deprive other persons of rights and privileges secured by Section 1971(a) of Title 42, United States Code, namely the right and privilege of citizens of the United States, who are otherwise qualified by law to vote at any election by the people in the State of Alabama, to be entitled and allowed to vote at all such elections without distinction of race or color.

2. This Court has jurisdiction of this action under 42 U.S.C. §1971(d), and under 28 U.S.C. §1345.

3. The complaint in this action also seeks a declaration of the rights, duties, and legal relations of the parties in accordance with 28 U.S.C. §§2201 and 2202.

4. The Registration Board is an independent state agency of the State of Alabama which exists as a separate entity and without regard to its membership. It possesses the following powers and duties, among others:

(a) to receive and consider applications for registration at designated times and places in Macon County;

(b) to register all qualified applicants of Macon County;

(c) to preserve registration records according to state law;

(d) to operate a registration office.

The Registration Board is under a constitutional obligation to fulfill the foregoing duties without regard to considerations of race or color.

For many years the Registration Board, whatever its membership, has persisted in acts and practices in violation of this constitutional obligation, which have resulted in depriving qualified citizens of their right to vote solely by reason of their race or color. To obtain permanent preventive relief against such acts and practices, it is necessary that the judgment of the Court be entered against and become binding upon the Registration Board however constituted, so that the judgment will, to the fullest extent permitted by law, be operative against all future members of the Registration Board.

A judgment is sought declaring such past acts and practices of the Registration Board to be illegal under the Constitution and laws of the United States. Further, a judgment is sought enjoining the Registration Board from engaging in such illegal acts and practices in the future.

5. Defendant Grady Rogers became a member of the Registration Board in 1951 and he served in such capacity until his successor was appointed in 1955. Said Defendant Grady Rogers and Defendant E. P. Livingston became members of the current Registration Board in August 1956 and March 1957, respectively. In their official capacities these Defendants are and have been responsible for receiving applications to register to vote and for registering qualified applicants in Macon County, Alabama. Said Defendants, while discharging the duties of their offices, were and are acting under color of law of the State of Alabama. In the course of their official duties, said Defendants have discriminated against qualified Negro citizens on account of their race or color. A judgment is sought declaring such past acts and practices to be illegal

under the Constitution and laws of the United States. Further, an order is sought enjoining said Defendants, so long as they remain responsible for the duties of their office, and their successors, when appointed and qualified, from engaging in such illegal acts and practices in the future.

6. Defendants Grady Rogers and E. P. Livingston purported to resign as registrars in December 1958. Under applicable law, however, they are required to continue to perform duties and functions as registrars until their successors are appointed and have qualified.

7. Under the provisions of the statutes and the Constitution of the State of Alabama, registration is a prerequisite to voting at any election by the people in the State. The qualifications for registration are set forth in Appendix A hereof.

8. In the year 1958, the white citizens of voting age in Macon County, Alabama, numbered approximately 3100 and the Negro citizens of voting age numbered approximately 14,000. On or about December 1, 1958, the white citizens registered to vote in Macon County numbered approximately 3016 (or approximately 97% of the white population of voting age) and the Negro citizens registered to vote in Macon County numbered approximately 1110 (or approximately 8% of the Negro population of voting age).

9. The disparity between the respective percentages of white and Negro citizens of voting age registered to vote in Macon County, Alabama, as set forth in paragraph 8 hereof, has been brought about and is being perpetuated by racially discriminatory acts and practices of the Defendants as specified hereinafter.

Such acts and practices include, but are not limited to, the following:

(a) The maintenance of separate, discriminatory, registration facilities for Negroes;

(b) The failure and refusal to convene and function as a board of registrars in order to avoid receiving applications to register to vote from Negroes;

(c) The maintenance of irregular and unreasonable hours and use of other evasive schemes to avoid receiving and processing applications to register from Negroes;

(d) The application of different and more stringent registration standards to Negro than to white applicants;

(e) The failure to register qualified Negro applicants.

4 10. The Defendants have followed the practice, custom and usage of maintaining in the Macon County Courthouse a registration office for Negro applicants separate and apart from that maintained for white applicants, and have required all Negroes who have applied for registration to use only said separate and segregated office. Said practice, custom and usage has been followed by Defendant Registration Board for a long period of time and by Defendants Rogers and Livingston during their entire tenure of office.

11. The Defendants, for the purpose of preventing Negroes from registering, have on numerous occasions failed and refused to convene and to receive and act upon applications for registration for voting.

12. For the purpose of preventing Negroes from registering the Registration Board did not perform its functions and duties for substantial periods of time. Such periods of time and such failure to perform its functions and duties have included the following:

(a) From 1946 to January 1948, the Registration Board rendered itself inoperative by the purported resignations of its only two members.

(b) From April 1948 to January 1949 the Registration Board failed and refused to convene and discharge its duty of receiving applications for registration, notwithstanding the fact that said Registration Board throughout that period had at least a quorum.

(c) From January 1956 to August 1956 the Registration Board rendered itself inoperative by the purported resignation of one of its only two members.

(d) From March 1957 to June 1957 the Registration Board failed and refused to convene and discharge its duty

of receiving applications for registration, notwithstanding the fact that said Registration Board had its full complement of members.

(e) From December 1958 to the present the Registration Board rendered itself inoperative by the purported resignation of its only two members.

13. The Defendants have followed arbitrary and discriminatory practices, as between Negro and white applicants, in the operation of registration facilities, including but not limited to the following:

(a) Unreasonably delaying the admittance of Negro, but not of white persons, to the registration office;

(b) The holding of irregular and unreasonable hours for the receipt of applications of Negroes;

(c) The refusal to entertain applications of Negroes at normal business hours;

(d) The failure to convene the Board at the times announced;

(e) The closing of the registration office provided for Negro applicants while registering white applicants elsewhere;

(f) The failure to reveal the hours at which the applications of Negroes would be received;

(g) Unreasonably prolonging the registration process in the case of those Negroes who finally were admitted to the registration office.

14. The Defendants have followed the practice of applying different and more stringent standards to Negro than to white applicants for registration for voting in Macon County, Alabama, with respect to the requirements of Alabama law that applicants fill out a written questionnaire; that applicants be able to read and write any article of the United States Constitution; and that applicants otherwise comply with such rules and procedures as may be made and prescribed by the Registration Board.

15. The Defendants have refused, for reason of race or color, to register many of the qualified Negro citizens of Macon County who made proper application for registration, including the following:

(a) Daniel Webster Wynn, who has a Ph.D degree from Boston University.

(b) Fidelia Jo Anne Adams, who has a B.S. degree from Tuskegee Institute and is now working for an M.S. degree in Organic Chemistry at that institution.

(c) Mrs. K. Eaton Scott, who has a B.S. degree from North Carolina College, Durham, North Carolina.

(d) Leida Ruth Williams Davison, who has a B.S. degree from Alabama State College and is now working for a Master's Degree at Tuskegee Institute.

(e) Betty Alice H nderson, who has a B.S. degree from Miner Teachers College, Washington, D. C.

6 (f) John W. Jackson, Jr., who has a B.S. degree in Architecture from Tuskegee Institute.

(g) Charles Edward Miller, who has a B.S. degree in Business Administration from West Virginia State College.

(h) Doris Ezell Nearror, who has a B.S. degree in Nursing Education from Tuskegee Institute.

(i) Bettye J. Mindingall Ward, who is a high school graduate and a graduate nurse.

(j) Bettie B. Quinn, who is a high school graduate and a graduate nurse.

(k) Marie Williams, who is a high school graduate and has had 3½ years towards a degree at Tuskegee Institute.

(l) George C. Busby, Sr., who is a high school graduate and has attended the Washington University College of Business Administration.

(m) Roberta A. Lightfoot, who is a high school graduate and a graduate nurse.

(n) Lena Hayden Johnson, who is a high school graduate.

(o) Estelle Johnson, who is a high school graduate.

(p) Artemisia Jones Junier, who has a B.S. degree from Tennessee State College and a graduate degree in Library Science from Atlanta University.

(q) Llewellyn Wilbert Davis, who has an M.S. degree from Columbia University.

(r) Jordan Davis, who has an A.B. degree and a Bachelor of Divinity degree from Union University, Richmond, Virginia.

(s) Eugenia Cook Billes, who has an A.B. degree in Education from Southern University.

(t) Juanita H. Howard, who is a high school graduate.

16. By the acts and practices described in this complaint, the Defendants have violated the Constitution and the laws of the United States.

17. There are reasonable grounds to believe that the Defendant Registration Board, the Defendants Grady Rogers, E. P. Livingston (so long as they remain responsible for the duties of their office), their successors, and the agents and employees of said Defendants, for the purpose of depriving qualified Negroes of their
7 right to vote, will continue to engage in the illegal acts and practices set forth in this complaint, unless enjoined by this Court.

WHEREFORE, Plaintiff respectfully prays:

(a) that this Court adjudge, decree and declare that the following practices are in violation of the Constitution and laws of the United States, and that the Defendants are under the legal duty not to engage in such practices:

(1) The maintenance of racially segregated registration facilities (as averred in paragraph 10 hereof);

(2) The refusal of a board of registrars to convene or to receive or to act upon applications for registration for voting for the purpose of preventing Negroes from becoming registered voters (as averred in paragraph 11 hereof);

(3) The following of arbitrary and discriminatory practices as between Negro and white applicants for registration, including the practices of

(a) Unreasonably delaying the admittance of Negro, but not of white persons, to the registration office;

(b) The holding of irregular and unreasonable hours for the receipt of applications of Negroes;

(c) The refusal to entertain applications of Negroes at normal business hours;

(d) The failure to convene the Board at the times announced;

(e) The closing of the registration office provided for Negro applicants while registering white applicants elsewhere;

(f) The failure to reveal the hours at which the applications of Negroes would be received;

(g) Unreasonably prolonging the registration process in the case of those Negroes who finally were admitted to the registration office. (as averred in paragraph 13 hereof);

(4) The application of different and more stringent standards to Negro than to white applicants for registration for voting (as averred in paragraph 14 hereof);

(5) The failure to register qualified Negro applicants for registration for voting on account of their race or color (as averred in paragraph 15 hereof).

8 (b) That this Court issue a permanent injunction enjoining the Defendant Registration Board, and the Defendants Grady Rogers, E. P. Livingston, their successors, and the agents and employees of said Defendants, from:

(1) Maintaining separate offices for Negro and white applicants;

(2) Failing and refusing, on the grounds of race or color, to convene and function as a board of registrars;

(3) Using different facilities and procedures for registering Negro applicants from those used for white applicants;

(4) Failing or refusing, for reasons of race or color, to register the persons listed in paragraph 15 of this complaint and others similarly situated;

(5) Applying different and more stringent standards and rules to Negro applicants for registration than to white applicants in the administration of registration requirements provided by the constitution and laws of the State of Alabama;

(6) Engaging in any other acts, practices, methods or procedures in whatever form, whether by law, custom, or otherwise, which discriminate or tend to descriminate against any applicant for registration for voting in Macon County, Alabama, on account of his race or color.

(c) That this Court grant such additional relief as justice may require or as may be required in aid of the jurisdiction of this Court.

By direction of the Attorney General:

W. Wilson White
W. Wilson White
Assistant Attorney General

Hartwell Davis
Hartwell Davis
United States Attorney

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9 **Appendix A to Complaint**

Provisions of Alabama Law Respecting the Qualifications and Disqualifications for Registering to Vote

Section 32 of Title 17 of the Code of Alabama provides as follows:

> §32. Persons qualified to register.—The following persons, and no others, who, if they are citizens of the United States over the age of twenty-one years and have the qualifications as to residence prescribed in section 178 of the constitution [two years in the state, one year in the county, three months in the precinct or ward], shall be qualified to register as electors pro-

vided they shall not be disqualified under section 182 of the constitution; those who can read and write any article of the constitution of the United States in the English language which may be submitted to them by the board of registrars. No persons shall be entitled to register as electors except those who are of good character who embrace the duties and obligations of citizenship under the constitution of the United States and under the constitution of the state of Alabama.

Section 182 of the Constitution of the State of Alabama provides:

Section 182. The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crimes against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

Section 31 of Title 17 of the Code of Alabama provides:

§31. Examination and oath of applicants to register. —The board of registrars shall have power to examine,

under oath or affirmation, all applicants for registration, and to take testimony touching the qualifications of such applicants. In order to aid the registrars to judicially determine if applicants to register have the qualifications to register to vote, each applicant shall be furnished by the board a written questionnaire, which shall be uniform in all cases with no discrimination as between applicants, the form and contents of which questionnaire shall be prescribed by the supreme court of Alabama and be filed by such court with the secretary of state of the state of Alabama. The questionnaire shall be so worded that the answers
11 thereto will place before the registrars information necessary or proper to aid them to pass upon the qualifications of each applicant. The questionnaire shall be answered in writing by the applicant, in the presence of the board without assistance. There shall be incorporated in such answer an oath to support and defend the constitution of the United States and the constitution of the state of Alabama and a statement in such oath by the applicant disavowing belief in or affiliation at any time with any group or party which advocated the overthrow of the government of the United States or the state of Alabama by unlawful means. The answers and oath shall be duly signed and sworn to by the applicant before a member of the board. Such questionnaire and the written answers of the applicant thereto shall be filed with the records of the board of registrars. If solely because of physical handicaps the applicant is unable to read or write, then he shall be exempt from the above stated requirements which he is unable to meet because of such physical handicap, and in such cases a member of the board shall read to the applicant the questionnaire and oaths herein provided for and the applicant's answers thereto shall be written down by such board member; and the applicant shall be registered as a voter if he meets all other requirements herein set out. Each member of the board is authorized to administer the oaths to be taken by the applicant and witnesses.

Section 33 of Title 17 of the Code of Alabama provides:

§33. Applicants may be refused.—Any person making application to the board of registrars who fails to establish by evidence to the reasonable satisfaction of the board of registrars that he or she is qualified to register, may be refused registration.

(File endorsement omitted)

12 Summons in a Civil Action

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action File No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*

v.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, *Defendants*

Summons and Marshal's Return—Filed February 9, 1959

To the above named Defendants:

You are hereby summoned and required to serve upon Hon. Hartwell Davis, United States Attorney plaintiff's attorney, whose address is Post Office Building, Montgomery Alabama, an answer to the complaint which is herewith served upon you, within Twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

R. C. DORSON
Clerk of Court.

ANNIE SCHOOLAR
Deputy Clerk.

[Seal of Court]

Date: February 6, 1959

Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

13 RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 6th day of February 1959, I received this summons and served it together with the complaint herein as follows: on February 6, 1959 I served a copy thereof, with a copy of the complaint attached on Grady Rogers, by handing a copy to him in the Capitol Buildin Montgomery, Alabama at 10:30 AM.

CHARLES S. PRESCOTT
United States Marshal.

By JACK S. JOHNSON
Deputy United States Marshal.

this .....

Marshal's Fees
Travel .... $ .20
Service 2.00

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

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14 **Marshal's Return on Service of Writ**

(omitted in printing)

(File endorsement omitted)

15 Summons in a Civil Action

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action File No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*

v.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, *Defendants*

14

Summons and Marshal's Return—Filed February 9, 1959

To the above named Defendants:

You are hereby summoned and required to serve upon Hartwell Davis, United States Attorney, P. O. Building, Montgomery, Alabama, plaintiff's attorney, whose address is Post Office Building, Montgomery Alabama, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

R. C. Dobson
Clerk of Court.

R. E. Crory
Deputy Clerk.

[Seal of Court]

Date: February 6, 1959

Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

15A RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 6th day of February 1959, I received this summons and served it together with the complaint herein as follows: on February 6, 1959 at 9:10 AM I served a copy thereof, with a copy of the complaint attached on the Attorney General, State of Alabama, by handing copy to Willard W. Livingston, Adm. Asst. to the Attorney General, Administrative Building, Montgomery, Ala.

Charles S. Prescott
United States Marshal.

By Jack S. Johnson
Deputy United States Marshal.

this

.....

Marshal's Fees
Travel .... $ .20
Service ... 2.00

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

(File endorsement omitted)

16 IN UNITED STATES DISTRICT COURT

UNITED STATES DEPARTMENT OF JUSTICE

Appearance—Filed February 12, 1959

UNITED STATES ATTORNEY
MIDDLE DISTRICT OF ALABAMA
MONTGOMERY, ALA.

February 12, 1959

In reply refer to
style of case and
JMFR:hs

Mr. R. C. Dobson
Clerk, U. S. District Court
Middle District of Alabama
Montgomery, Alabama

Re: United States of America v.
The Board of Registrars of
Macon County, Alabama; Grady
Rogers, E. P. Livingston, Registrars
Civil Action No. 479-E

Dear Mr. Dobson:

Will you kindly enter my appearance in the above styled litigation as an attorney for the Plaintiff, United States of America.

Yours very truly,

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney, Department of Justice

16

(File endorsement omitted)

17 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Plaintiff's Motion to Produce and to Permit the Inspection, Copying and Photographing of Records Under Rule 34, Federal Rules of Civil Procedure—Filed February 12, 1959

1. Comes now the United States of America, by its attorneys, and moves this Court for an order directing the defendants herein to produce and to permit the inspection, copying, and photographing of the following records, documents and papers, and directing the defendants not to destroy or to transfer possession, custody, or control of such records, documents and papers at any time prior to the completion of the requested inspection:

(a) All applications for registration, and all questionnaires and oaths relating to such applications or registrations, received by the Macon County Board of Registrars since January 1, 1954.

(b) All records and documents made or received by the Macon County Board of Registrars since January 1, 1954, relating to or reflecting the ability of applicants for registration to read and write any article of the Constitution of the United States in the English language (as prescribed by section 32, Title 17, Code of Alabama, 1940).

18 (c) Copies of any rules and regulations made by the Macon County Board of Registrars regarding registration (in accordance with section 53, Title 17, Code of Alabama, 1940).

(d) All other records, documents, or papers which have been made or received by the Macon County Board of Registrars since January 1, 1954, concerning the qualifications for voting of any applicant for registration.

2. The defendants herein have possession, custody, or control of each of the foregoing records, documents, and papers, as is more fully shown in Exhibit A, attached hereto and incorporated herein by reference.

3. The foregoing records, documents, and papers are material and relevant to the subject matter involved in this action, as is more fully shown in Exhibit A, attached hereto and incorporated herein by reference.

4. There is a necessity that this Court specifically insure the availability of the foregoing records, documents and papers, as is more fully shown in Exhibit A, attached hereto and incorporated herein by reference.

5. There is a necessity that this matter be disposed of speedily, as is more fully shown by Exhibit A, attached hereto and incorporated herein by reference.

WHEREFORE the premises considered it is respectfully moved that this Court

(a) set this motion down for an immediate hearing;

(b) issue an appropriate order requiring the defendants to preserve and produce for inspection, copying and photographing the records, documents and papers described in paragraph 1 (a) through (d) hereof;

19 (c) grant such further relief as will protect the jurisdiction of this Court and the rights of the plaintiff in this matter and as the interests of justice may require.

W. WILSON WHITE
W. Wilson White
Assistant Attorney General

HARTWELL DAVIS
Hartwell Davis
United States Attorney

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney, Department of Justice

CERIFICATE OF SERVICE

(omitted in printing)

---

20 **Exhibit A to Plaintiff's Motion, etc.**

District of Columbia, SS

I, Joseph M. F. Ryan, Jr., being duly sworn according to law depose and say as follows:

1. That I am an attorney of record for plaintiff in the instant case of United States v. Board of Registrars of Macon County, Alabama et al., and that I am familiar with the complaint and the motion filed in said cause and with the facts underlying such complaint and such motion.

2. That defendants Grady Rogers and E. P. Livingston were appointed in and have served as members of the current Board of Registrars of Macon County, Alabama since August 1956 and March 1957 respectively.

3. That on or about December 11, 1958 said defendants, Grady Rogers and E. P. Livingston purported to resign as registrars of Macon County, Alabama, but under applicable law such purported resignations are not effective to divest them of continuing responsibility for the conduct of office and the safekeeping of documents, records, and papers of such office until their successors are appointed, and qualified. As of this date no such successors have been appointed.

4. That defendants pursuant to the provisions of Title 17, section 31, Code of Alabama, 1940, make and keep the records, documents, and papers pertaining to the conduct of the business of the Board of Registrars of Macon County, Alabama.

5. That by virtue of the obligations of said defendants mentioned in paragraphs 3 and 4, the documents, records, and papers sought for production, inspection, copying and photographing in plaintiff's motion are in the possession, custody or control of defendants.

21 6. That the registration records, documents, and papers sought by plaintiff's motion and described

therein constitute or contain evidence relating to matters which are relevant to the subject matter of the pending action, United States v. Board of Registrars of Macon County, Alabama, et al., in that said action alleges certain racially discriminatory acts and practices of defendants with respect to registration for voting and the records sought are needed by the plaintiff effectively to demonstrate this pattern of discrimination.

7. That on or about December 2, 1958, the Commission on Civil Rights, an independent agency of the federal Government, issued and served subpoenas for the production of certain voting records in the possession, custody, or control of defendants herein for use in a Commission hearing held on December 8, 1958 in Montgomery, Alabama.

8. That on or about December 8, 1958 defendants Grady Rogers and E. P. Livingston purported to relinquish custody of such records to the Circuit Solicitor of the Fifth Judicial Circuit of Alabama, which includes Macon County, Alabama, thereby attempting to place themselves in a position of being unable to produce the said records in accordance with the said subpoenas described in paragraph 7.

9. That on or about January 6, 1959, defendants Grady Rogers and E. P. Livingston pursuant to the order of this Court in Civil Action No. 1487-N entered January 5, 1959 produced the records of the Board of Registrars of Macon County to agents of the Commission on Civil Rights. Said records were at that time located in the courthouse of Macon County, Alabama.

22 10. That in connection with the hearing by the Commission on Civil Rights mentioned in paragraph 7 the Attorney General of the State of Alabama, presently the Governor of the State, advised members of the Board of Registrars in Macon County and other counties in the State of Alabama to withhold from the federal Government all records pertaining to voting and registration for voting.

11. That there is presently pending in the legislature of the State of Alabama a proposal to authorize Boards of Registrars to destroy voting registration records relating to unsuccessful applicants for registration. Such proposal

has been endorsed by the Governor and approved by the Privileges and Election Committee of the Senate of the State of Alabama. Its enactment appears imminent.

12. That all of the voting and registration records of Macon County sought by this motion including those of unsuccessful applicants are necessary for the preparation and presentation of the case in United States v. Board of Registrars of Macon County, Alabama, et al., and that any relinquishment of control which precludes access to the records sought or destruction of said records would substantially affect the ability of the plaintiff to present to the Court the evidence necessary to prove the cause herein.

13. That in view of the facts alleged in paragraph 8 and in view of the pending legislation described in paragraph 10, and in order to insure plaintiff the right to inspect the records described in the motion it is necessary that this Court expedite a hearing on this motion and cause such hearing to be set down for argument immediately.

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.

Subscribed and sworn to before me this 11th day of February, 1959

LOUIS E. MCDONOUGH
Notary Public
My Commission Expires July 31, 1962

(Seal)

(File endorsement omitted)

23 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

(Title omitted)

**Motion for Temporary Restraining Order—
Filed February 12, 1959**

Comes now the plaintiff in the above entitled matter, the United States of America, and shows unto the Court as follows:

1. That heretofore on February 12, 1959, plaintiff filed in this cause a Motion to Produce under Rule 34, Federal Rules of Civil Procedure, herein incorporated by reference, seeking the production of certain voter registration records of the Board of Registrars of Macon County, Alabama, which are more fully particularized in said Motion and such records constitute or contain evidence which is relevant to the subject matter in this cause.

2. That any destruction, removal or dissipation of any of said records would substantially affect and injure the ability of the plaintiff to present to the Court necessary material and relevant evidence in the cause herein, thereby causing irreparable injury to the rights of certain citizens of the State of Alabama in whose behalf it is the duty and obligation of the United States to protect by appropriate action in the Federal Courts pursuant to the Civil Rights Act of 1957.

3. That on February 11, 1959, the Senate of the legislature of the State of Alabama in an action reportedly indorsed by the Governor by a unanimous vote passed a bill which provides for the destruction of records, which would include the very records which are the subject matter of the Motion to Produce herein. A copy of said bill, SB-18, as passed is attached hereto as Exhibit A.

4. That the publicly stated purpose of the aforesaid bill is to deprive the Government of the United States acting through its Courts or agencies of access to such records.

24 5. That the enactment of such bill into law appears to be imminent.

6. That to preserve the status quo pending a hearing on the Motion to Produce heretofore filed by plaintiff and in order to save the plaintiff from irreparable injury as described herein in paragraph 2, it is necessary that an order issue from this Court, without notice, restraining defendants, their agents, attorneys, associates, employees or any person or persons acting for and through them, from destroying, mutilating, damaging, removing or otherwise rendering such records unavailable.

HARTWELL DAVIS
Hartwell Davis
United States Attorney

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney,
Department of Justice

Duly sworn to by Joseph M. F. Ryan, Jr.
jurat omitted in printing

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25 **Exhibit "A"—to Motion for Temporary Restraining Order**

Substitute for S.B. 18 and Committee Amendments—
By Givhan

A BILL
TO BE ENTITLED
AN ACT

To amend further Section 31 of Title 17, Code of Alabama 1940, relating to examinations of applicants to register.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 31, Title 17, Code of Alabama 1940, as amended by Act No. 754, Acts of 1953, is amended further to read as follows:

"Section 31. The board of registrars shall have power to examine, under oath or affirmation, all applicants for

registration, and to take testimony touching the qualifications of such applicants. In order to aid the registrars to judicially determine if applicants to register have the qualifications to register to vote, each applicant shall be furnished by the board a written questionnaire, which shall be uniform in all cases with no discrimination as between applicants, the form and contents of which questionnaire shall be prescribed by the Supreme Court of Alabama and be filed by such Court with the Secretary of State of the State of Alabama. The questionnaire shall be so worded that the answers thereto will place before the registrars information necessary or proper to aid them to pass upon the qualifications of each applicant. The questionnaire shall be answered in writing by the applicant, in the presence of the board without assistance. There shall be incorporated in such answer an oath to support and defend the Constitution of the United States and the Constitution of the State of Alabama and a statement in such oath by the applicant disavowing belief in affiliation at any time with any group or party which advocated the overthrow of the government of the United States or the State of Alabama by unlawful means. The answers and oath shall be duly signed and sworn to by the applicant before a member of the Board. If solely because of physical handicaps the applicant is unable to read or write, then he shall be exempt from the above stated requirements which he is unable to meet because of such physical handicap, and in such cases a member of the board shall read to the applicant the questionnaire and oath herein provided for and the applicant's answers thereto shall be written down by such board member; and the applicant shall be registered as a voter if he meets all other requirements herein set out. Each member of the board is authorized to administer the oaths to be taken by applicants and witnesses. The questionnaires and written answers of persons applying for registration shall not become public records as public records are defined under the laws of the State of Alabama, nor shall the board disclose the information contained in such questionnaires and written answers except with the written consent of the person who filed the answer or pursuant to the order of a court of competent jurisdiction in a proper proceeding. Such questionnaires and the answers of applicants

shall be preserved by the board for a period of thirty days, after denial after which, if no appeal has been taken as provided in Section Thirty-Five of this Title, they shall be kept with the records of the board of registrars or disposed of in such manner as the board may direct."

Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

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26 **Marshal's Returns on Service of Writ**

(Omitted in printing).

(File endorsement omitted)

29 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

(Title omitted)

Temporary Restraining Order—February 12, 1959

This cause came on to be heard on plaintiff's verified motion for temporary restraining order pending disposition of a motion to produce heretofore filed by plaintiffs, said restraining order being sought by the plaintiff without notice because of alleged immediate and irreparable injury and loss or damage to plaintiff:

1. It appears that on or about February 5, 1959, the United States filed in this court a complaint seeking a permanent injunction against defendants herein, enjoining said defendants from engaging in racially discriminatory acts or practices relating to voting qualifications in violation of the Constitution and laws of the United States.

2. That it further appears that plaintiff has filed in this court a motion to produce, pursuant to Rule 34, Federal Rules of Civil Procedure, certain voting records in the possession, custody or control of defendants, which

constitute or contain evidence which is relevant to the subject matter of this action and it further appears that such records are necessary for the presentation of this cause.

3. It further appears that any destruction, mutilation, damaging, removing or otherwise rendering unavailable any such records would substantially affect and injure plaintiff's ability to present to the court the evidence necessary to prove this cause, thereby causing irreparable injury to the right of certain citizens of the State of Alabama in whose behalf it is the duty and obligation of the United States to protect by appropriate action in the Federal Courts pursuant to the Civil Rights Act of 1957.

4. It further appearing that on February 11, 1959, the Senate of the Legislature of the State of Alabama in an action reportedly indorsed by the Governor by a unanimous vote passed a bill which provides for the destruction of records, which would include the very records which are the subject matter of the motion to produce herein.

5. It further appearing that the publicly stated purpose of the aforesaid bill is to deprive the Government of the United States acting through its Courts or agencies of access to such records.

6. It further appearing that the enactment of such bill into law appears to be imminent.

It further appearing that a restraining order, preliminary to the hearing on plaintiff's motion to produce, should issue without further notice because immediate irreparable injury may result to the plaintiff before notice can be served or hearing had thereon,

THEREFORE, it is the ORDER, JUDGMENT and DECREE of the Court that the defendants, their agents, attorneys, associates, employees and all persons acting by, through, or under them, be and they are hereby restrained until the further order of this court from destroying, mutilating, damaging, removing or otherwise rendering unavailable the following records, papers and documents:

A. All applications for registration, and all questionnaires and oaths relating to such applications or registrations, received by the Macon County Board of Registrars since January 1, 1954.

B. All records and documents made or received by the Macon County Board of Registrars since January 1, 1954, relating to or reflecting the ability of applicants for registration to read and write any article of the Constitution of the United States in the English language (as prescribed by Section 32, Title 17, Code of Alabama, 1940).

C. Copies of any rules and regulations made by the Macon County Board of Registrars regarding registrations (in accordance with Section 53, Title 17, Code of Alabama, 1940).

D. All other records, documents, or papers which have been made or received by the Macon County Board of Registrars since January 1, 1954, concerning the qualifications for voting of any applicant for registration.

The United States Marshal is directed to serve an attested copy of this order forthwith on each of the defendants.

Done at 5:00 o'clock P.M., this 12th day of February 1959.

FRANK M. JOHNSON, JR.
Frank M. Johnson, Jr.,
United States District Judge

32 **Marshal's Returns on Service of Writ**

(Omitted in printing)

(File endorsement omitted)

35 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Order Setting Hearing on Plaintiff's Motion to Produce—February 13, 1959

The plaintiff in this cause, the United States of America, having heretofore filed a Motion to Produce under Rule 34 of the Federal Rules of Civil Procedure, for the production, inspection, copying and photographing of certain voter registration records in the custody or control of the defendants, it is

ORDERED, ADJUDGED, and DECREED that said Motion be and the same is hereby set down for hearing by this Court on February 23, 1959, at 10:00 A.M. in the Courtroom, Montgomery, Alabama.

The Clerk of this Court is directed to serve a copy of this order to all parties to this cause.

Done this 13th day of February, 1959.

FRANK M. JOHNSON, JR.
Frank M. Johnson, Jr.
United States District Judge

35A **Attachment to Order**

UNITED STATES DISTRICT JUDGE'S CHAMBERS
MIDDLE DISTRICT OF ALABAMA
MONTGOMERY 1, ALABAMA

FRANK M. JOHNSON, JR.
DISTRICT JUDGE

February 16, 1959

Mr. Joseph M. F. Ryan, Jr.
Attorney, Civil Rights Division
Department of Justice
Washington 25, D. C.

Mr. E. P. Livingston
Notasulga, Alabama

Mr. Hartwell Davis
United States Attorney
Federal Building
Montgomery, Alabama

Mr. Grady Rogers
Route 1
Tuskegee, Alabama

Mr. MacDonald Gallion
The Attorney General
State of Alabama
Montgomery, Alabama

Re: United States of America vs. The Board of Registrars of Macon County, Alabama; Grady Rogers, E. P. Livingston, Registrars
Civil Action No. 479-E

Gentlemen:

The above-styled case is set on Tuesday, March 3, 1959, at 2:00 p.m., in chambers in Opelika, Alabama, for the purpose of a pre-trial hearing as provided by Rule 16 of the Rules of Civil Procedure for the District Courts of the United States.

This hearing will be addressed to consideration of the matters provided for in Rule 16. All parties should prepare and submit to the other parties prior to this hearing any necessary or desirable amendments or additions to the pleadings. All parties should also prepare and have ready all possible admissions of fact and of documents which might avoid unnecessary proof upon trial, and should consider the possibility of limitation of the number of

expert witnesses, the advisability of a reference to a special master, and any other matters that might aid in the disposition of the action.

All motions will be heard at the above-stated time.

It is necessary that the attorneys who are to try this case appear at the time above designated, and be fully prepared to state the facts of the case in the most minute detail, and to admit all facts that are true. Failure to comply with these requirements will receive appropriate penalties.

By direction of Honorable Frank M. Johnson, Jr., United States District Judge.

Yours very truly,

.....

Secretary.

35B **Attachment to Order**

February 19, 1959

Hon. Joseph M. F. Ryan, Jr.
Attorney, Civil Rights Division
Department of Justice
Washington 25, D. C.

Hon. Hartwell Davis
United States Attorney
Montgomery, Alabama

Hon. MacDonald Gallion
The Attorney General
State of Alabama
Montgomery, Alabama

Hon. Lawrence K. Andrews
Attorney at Law
Union Springs, Alabama

Re: U. S. v. The Board of Registrars et al—
Civil No. 479-E

SET FOR TRIAL THURSDAY, MARCH 19, 1959,
AT 10:00 A.M.

Re: United States of America vs. The Board of Registrars of Macon County, Alabama; Grady Rogers, E. P. Livingston, Registrars Civil Action No. 479-E

Gentlemen:

I am informed by the Honorable Hartwell Davis, United States Attorney for this district, that all the attorneys in the above-captioned matter have agreed that the venue for this cause be changed from the Eastern division in Opelika, Alabama, to the Northern division here in Montgomery, Alabama. Such a change is satisfactory with this Court. You may, therefore, disregard the pre-trial notice forwarded to you dated February 16, 1959, which notice advised you that this matter was set in Opelika, Alabama, on March 3, 1959, at 2 p.m., for the purpose of a pre-trial hearing.

Since, by agreement, the case is to be heard for all purposes here in Montgomery, Alabama, you are informed that the pre-trial hearing will be Thursday, March 5, 1959, commencing at 10:00 a.m., in chambers here in Montgomery, Alabama.

Very truly yours,

FRANK M. JOHNSON, JR.
United States District Judge

(File endorsement omitted)

36 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Civil No. 479-E

(Title omitted)

Notice of Intention to Take Oral Testimony—Filed February 20, 1959

Plaintiff, United States of America, gives notice that it intends to take oral testimony at the Hearing on the Motions and other Pleadings set for February 23, 1959.

Dated this 20th day of February 1959.

HARTWELL DAVIS
Hartwell Davis,
United States Attorney

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

37 IN THE UNITED STATES DISTRICT COURT

(Title omitted)

Motion to Dissolve the Temporary Restraining Order—Filed February 20, 1959

Come respondents, Grady Rogers and E. P. Livingston, personally and in their individual capacity only, and in no other capacity, and admit service on them as individuals and admit jurisdiction of this Court on them as individuals, but as individuals only, and appearing specially for the purposes of this motion and without admission of jurisdiction or authority of this Court over them in a representative capacity or over the Board of Registrars of Macon County, Alabama, or the State of Alabama, and move that the temporary restraining order heretofore issued by this Court be dissolved or set aside and dismissed, and in support thereof show the following facts and grounds:

1. Neither of them are in possession of the records, documents and papers mentioned in the restraining order; that they do not have access to said records or control over them and they cannot produce them even if commanded to do so; that they cannot destroy, mutilate, damage, remove or otherwise render such records unavailable to this Court; all as is more fully shown in Exhibits A and B, attached hereto and incorporated herein by reference.

2. That they do not have the power or authority over said records to destroy, mutilate, damage, remove
38 or otherwise render such records unavailable to this Court, nor do they have the actual physical

control or possession of said records which might enable them to do so.

3. That they have no intention of mutilating, damaging, removing or otherwise rendering such records unavailable to this Court.

4. That they have vacated the office as members of the Board of Registrars of Macon County, Alabama, and that they had done so prior to the institution of this suit and prior to any service of process upon them; that they have no intention of and do not propose to serve again as members of the Board of Registrars of Macon County, Alabama; that they resigned as members of the Board of Registrars of Macon County, on to wit, December 10, 1958, that said office was vacated; that their resignation was in writing and unconditional and is effective and has been accepted; that moreover the appointing authority has removed them from the said office; that each has qualified for, and begun to serve in, another State office, which automatically, or ipso facto, removes them from the first office, viz., the office of members of the Board of Registrars of Macon County, Alabama.

5. That the matter is moot.

6. That the matter is moot for the additional reason that the plaintiff has already had access to the records and it is understood that they photographed same.

7. That this injunction was sought only for embarrassment, publicity or other improper reasons.

8. This Court is asked to indulge in speculation as to what the Legislature of Alabama may pass.

9. The injunction is premature.

10. The matter is moot on its face in this: Senate Bill 18, referred to in the motion for the temporary restraining order, and upon which the plaintiff bases its prayer for temporary injunction, shows on its face that the bill would authorize the Board of Registrars to dispose of the records in such manner as the Board may direct; therefore, it requires action of a Board not of an

individual; and furthermore the Board cannot act unless the action is taken by a majority thereof.

Respectfully submitted,

For Grady Rogers and E. P. Livingston

By—

L. P. Andress
Attorney

MacDonald Gallion
Attorney General,
State of Alabama

N. S. Hare
Sp. Ass't Atty Gen.

Certificate of Service

(Omitted in printing)

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40 **Exhibit A1.—to Motion, etc.**

State of Alabama.

I, E. P. Livingston, being duly sworn according to law, depose and say as follows:

Boards of Registrars in Alabama are composed of three members. The members of the Board of Registrars of Macon County, prior to December 10, 1958, were Grady Rogers and E. P. Livingston, the third member having died. On December 8, 1958, Grady Rogers and E. P. Livingston physically delivered all the records of the Board of Registrars of Macon County, Alabama, and turned them over to the Sheriff of Macon County, Alabama, the Honorable Preston Hornsby; that at that time the said Sheriff was custodian of the Court House of Macon County, Alabama; that E. P. Livingston was served with a subpoena duces tecum (copy attached, marked B), and in response thereto the records were turned over to the Sheriff and physically delivered to him for safe keeping and preservation and/or transmission to the Judge of Probate, Circuit Solictor or such other official charged by law to preserve or act as custodian of such records; that

deponent understands that said records are stored in the Macon County Court House in a locked room or container and that the said Sheriff or the solicitor have the keys thereo; deponent says that he has no keys thereto; that he does not have custody of said records or access to them; that he does not have possession of same and that even if the Court ordered him to produce them, he could not comply with such an order; that the last official act of this deponent as a member of the Board of Registrars of Macon County, Alabama, was to give up possession of said records as aforesaid, and since that time and since dependent's
41 resignation as a member of said Board of Registrars, the deponent has had no custody or control over said records or anything to do with them. Deponent further states that on December 10, 1958, he resigned as a member of the Board of Registrars of Macon County, absolutely and unconditionally, by written resignation delivered to the Appointing Board; that said resignation was in good faith and further that deponent does not intend to serve again as a member of the Board of Registrars; that said resignation has been accepted by the Appointing Board; that additionally the Appointing Board has notified him that he has been removed therefrom; that deponent has accepted, qualified and begun serving in another public office for profit, which of itself automatically vacates any prior office, viz., that of member of the Board of Registrars of Macon County, Alabama; that at the time this suit was filed and at the time of the service of process, deponent was not acting in any representative capacity for said Board of Registrars; was not a member thereof and had no authority or connection whatever with said Board of Registrars. Deponent further states that he does not have the power, legal or actual, to destroy, mutilate, damage or remove any of said records and has no intention of doing so.

E. P. LIVINGSTON
Affiant

Sworn to and subscribed before me on this the 20th day of February 1959.

IDA LEE DOZIER
Notary Public

(Seal)

STATE OF ALABAMA.

I, Grady Rogers, being duly sworn according to law, depose and say as follows:

Boards of Registrars in Alabama are composed of three members. The members of the Board of Registrars of Macon County, prior to December 10, 1958, were Grady Rogers and E. P. Livingston, the third member having died. On December 8, 1958, Grady Rogers and E. P. Livingston physically delivered all the records of the Board of Registrars of Macon County, Alabama, and turned them over to the Sheriff of Macon County, Alabama, the Honorable Preston Hornsby; that at that time the said Sheriff was custodian of the Court House of Macon County, Alabama; that E. P. Livingston was served with a subpoena duces tecum (copy attached, Marked B), and in response thereto the records were turned over to the Sheriff and physically delivered to him for safe keeping and preservation and/or transmission to the Judge of Probate, Circuit Solicitor or such other official charged by law to preserve or act as custodian of such records; that deponent understands that said records are stored in the Macon County Court House in a locked room or container and that the said Sheriff or the solicitor have the keys thereto; deponent says that he has no keys thereto; that he does not have custody of said records or access to them; that he does not have possession of same and that even if the Court ordered him to produce them, he could not comply with such an order; that the last official act of this deponent as a member of the Board of Registrars of Macon County, Alabama, was to give up possession of said records as aforesaid, and since that time and since deponent's
43 resignation as a member of said Board of Registrars, the deponent has had no custody or control over said records or anything to do with them. Deponent further states that on December 10, 1958, he resigned as a member of the Board of Registrars of Macon County, absolutely and unconditionally, by written resignation delivered to the Appointing Board; that said resignation was in good faith and further that deponent does not intend to serve again as a member of the Board of

Registrars; that said resignation has been accepted by the Appointing Board; that additionally the Appointing Board has notified him that he has been removed therefrom; that deponent has accepted, qualified and begun serving in another public office for profit, which of itself automatically vacates any prior office, viz., that of member of the Board of Registrars of Macon County, Alabama; that at the time this suit was filed and at the time of the service of process, deponent was not acting in any representative capacity for said Board of Registrars; was not a member thereof and had no authority or connection whatever with said Board of Registrars. Deponent further states that he does not have the power, legal or actual, to destroy, mutilate, damage or remove any of said records and has no intention of doing so.

GRADY ROGERS
Affiant

Sworn to and subscribed before me on this the 20th day of February 1959.

IDA LEE DOZIER
Notary Public

(Seal)

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44 **Exhibit B—to Motion, etc.**

Subpoena Duces Tecum

THE STATE OF ALABAMA, MACON COUNTY

CIRCUIT COURT

To any Sheriff of the State of Alabama—Greeting:

You are hereby commanded to summon E. P. LIVINGSTON at the instance of Tom F. Young, Circuit Solicitor of 5th Judicial Circuit if he shall be found in your County, personally to be and appear before the said Circuit Solicitor of said County at the Courthouse at Tuskegee, Alabama in and for said County, to-wit: On the 9th day of December 1958, and to bring with him and produce at the time and place aforesaid, to be used as evidence certain instruments of writing, purporting to be All Records, Books and Dossiers pertaining to and maintained by him as Member of the Board of Registrars for Macon County,

Alabama, bearing date to date, in the year of our Lord One Thousand Nine Hundred and Fifty-Eight, then and there to testify, and the truth to speak, concerning all and singular those things of which he may have knowledge, or the said instrument of writing doth import of, and concerning a certain cause now pending and undetermined in the said County wherein State of Alabama, is Plaintiff, and John Doe, Alias, is Defendant. And this he shall in nowise omit, under penalty of what the law directs: and have you then and there this Writ, with an indorsement thereon in what manner you shall have executed the same.

Witness, ..., this 3rd day of December, 1958.

s/
Circuit Solicitor,
Macon County, Ala.

Code 1940, Tit. 7, Sec. 485

(File endorsement omitted)

45 IN UNITED STATES DISTRICT COURT

(Title omitted)

Answer to or Objection to the Motion to Produce—Filed February 20, 1959

Appearing specially for the purpose of this objection and without admitting jurisdiction, come Grady Rogers and E. P. Livingston, individually, in response to the motion to produce and to permit the inspection, copying and photographing of records under Rule 34, Federal Rules of Civil Procedure, heretofore filed in this cause by the plaintiff and for answer to or objection to the said motion of the plaintiff, set down and assign the following grounds, separately and severally, as to Grady Rogers and E. P. Livingston separately and severally:

1. Grady Rogers and E. P. Livingston resigned as members of the Board of Registrars of Macon County, Alabama, prior to the institution of this suit and prior to the service of said motion upon them and they do not propose to serve again; that said resignation was in good faith and they have no intention of functioning again in

said capacity, all as is more fully shown by Exhibits A and B, attached hereto and incorporated herein by reference.

2. Grady Rogers and E. P. Livingston have had no official connection and no authority in respect to the said Board of Registrars, since to wit, December 10, 1958.

3. Grady Rogers and E. P. Livingston do not have possession of the records requested and are unable to comply with said motion even if it were granted.

46 4. Grady Rogers and E. P. Livingston do not have custody or control of said records and have not had said custody or control since to wit, December 8, 1958, when said records were physically turned over to and delivered to the Honorable Preston Hornsby, as Sheriff of Macon County, Alabama, who at that time was the custodian of the Court House of Macon County, Alabama. Said records were then turned over to him and physically delivered to him for safe keeping and preservation and/or for transmission to the Judge of Probate, Circuit Solicitor or such other official charged by law to preserve or act as custodian of such records and in response to a subpoena duces tecum, copy of which is attached hereto and incorporated herein as Exhibit B. Grady Rogers and E. P. Livingston state that that was the last official act of theirs in their capacity as members of the Board of Registrars of Macon County, Alabama.

5. They do not have access to said records.

6. That the Board of Registrars of Macon County, Alabama, has no servants, agents or employees and does not exist except through its members, and it cannot deliver any records.

7. They deny that they are now members or agents of the Board of Registrars of Macon County, Alabama, or have been since prior to service of process and prior to the institution of this action.

8. Under the law of Alabama, said records are required to remain in Macon County, and this motion seeks to have parties produce said records in Montgomery, Alabama, which would require the parties violate the law.

9. It appears that the plaintiff has already had access to said records and photographed such of them as is material to their action.

47 10. That this motion is made for embarrassment, vexation or other improper reasons.

Respectfully submitted,

For GRADY ROGERS and E. P. LIVINGSTON

By—

L. P. ANDRESS
Attorney

MACDONALD GALLION
Attorney General,
State of Alabama

N. S. HARE
Sp. Ass't Atty Gen.

CERTIFICATE OF SERVICE

(Omitted in printing)

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48 **Exhibit A.1.—Affidavit of E. P. Livingston**

(Omitted. Printed side page ~~40~~ 33 supra)

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50 **Exhibit A.2.—Affidavit of Grady Rogers**

(Omitted. Printed side page ~~42~~ 35 supra)

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52 **Exhibit B—Subpoena**

(Omitted. Printed side page ~~44~~ 36 supra)

(File endorsement omitted)

53 IN UNITED STATES DISTRICT COURT

(Title omitted)

Motion to Strike and to Quash—Filed February 20, 1959

Now comes Grady Rogers and E. P. Livingston, separately and severally, appearing specially for the pur-

pose of this motion and for no other purpose and without admitting the jurisdiction of the Court and move the Court to quash the service or the purported service upon them by the United States Marshal of various papers in this cause. Movants admit jurisdiction of this Court on them as individuals, but as individuals only and not in any representative capacity, and movants set out the following facts and assign the following grounds, separately and severally:

A. Statement of Facts Relative to Return

It appears that there has been no service or attempted service of the complaint on the "Board of Registrars of Macon County, Alabama" as such; yet it does appear that such attempted service has been made in respect to the motion for a temporary restraining order and of the temporary restraining order.

The return made by the United States Marshal relative to service of the complaint is as follows:

> "I hereby certify and return that on the 6th day of February 1959, I received this summons and served it together with the complaint herein as follows: On February 6, 1959, I served a copy thereof, with a copy of the complaint attached on Grady Rogers, by handing a copy to him in the Capitol Building, Montgomery, Alabama, at 10:30 A.M."

And

54 > "I hereby certify that I served and annexed Summons and Complaint on the therein named E. P. Livingston by handing to and leaving a true and correct copy thereof with him personally at City Hall at Notasulga, Ala. at 9:30 A.M., the 6th day of February 1959."

The return made by the United States Marshal relative to service of the motion for the temporary restraining order and the temporary restraining order is as follows:

> "I hereby certify and return that I served the annexed order on the therein-named Grady Rogers, by handing to and leaving a true and correct copy thereof

with him personally at R.F.D., at Tuskegee, Alabama, in the said District at 5:15 P.M., on the 13th day of February 1959."

And

"I hereby certify and return that I served the annexed order on the therein-named E. P. Livingston, by handing to and leaving a true and correct copy thereof with him personally at City Hall, Notasulga, Alabama, in the said District, at 3:30 P.M., on the 13th day of February, 1959."

And

"I hereby certify and return that I served the annexed order on the therein-named The Board of Registrars of Macon County, by handing to and leaving a true and correct copy thereof with E. P. Livingston, Registrar, personally at City Hall, at Notasulga, Alabama, in said District, at 3:30 P.M., on the 13th day of February 1959."

B. Statement of General Facts

Movants show this Court that heretofore on, to wit, the 10th day of December 1958, and prior to the institution of this suit and prior to the purported service mentioned herein, movants resigned in good faith as members of the Board of Registrars of Macon County, Alabama, and vacated such office; that since said date movants have had no connection with the said Board of Registrars of Macon County, Alabama, and have not been authorized to act as agents or otherwise, nor have movants acted or attempted to act in any official capacity, as members of said Board of Registrars. Movants further show that prior to their resignation on December 10, 1958, as aforesaid, they did, on to wit, December 8, 1958, turn over and physically deliver all of the records then in the possession of the Board of Registrars of Macon County, Alabama, to the Honorable Preston Hornsby, as Sheriff of Macon County, Alabama; that the said Sheriff was at that time the custodian of the Macon

County Courthouse and that said records were, by your movants, then turned over to and physically delivered to him in response to a Subpoena Duces Tecum (copy attached, Marked Exhibit "B") for safe keeping and/or transmission by him to the Probate Judge or the Circuit Solicitor or such other official charged by law to act as custodian of or to preserve such records; and that since December 10, 1958, the date of movants resignation, as aforesaid, movants have not been in possession of or had access to the records involved in this case; and your movants further allege they are without authority to accept service of process related to said Board of Registrars or to function in any official capacity for said Board of Registrars and are without authority to deliver to any person any of said records or to destroy, mutilate, damage, or remove said records and that your movants have no such intention of so doing, all of which is more fully shown in Exhibit "A", attached hereto and incorporated herein by reference.

C. Grounds for Motion

And as further grounds for quashing service purportedly made upon movants in any capacity other than the individual capacity of movants, the following grounds are assigned, separately and severally:

1. No service can be made upon movants which could give this Court jurisdiction over the State of Alabama or any department or units thereof.

56 2. No service can be made upon movants which could give this Court jurisdiction over the Board of Registrars of Macon County, Alabama.

3. For that it appears from the bill of complaint and the facts herein alleged that movants had no official connection with the said Board of Registrars of Macon County, Alabama at the time suit was filed or at the time of service.

4. For that it appears from the facts alleged herein that movants are not and have not been agents, servants or employees of the Board of Registrars of Macon County, Alabama, since a time prior to the institution of this suit.

5. For that it appears from the facts alleged herein that movants had no official capacity at the time of the purported service with reference to the Board of Registrars of Macon County, Alabama; that the service or purported service upon movants, as members of the Board of Registrars of Macon County, Alabama, is a nullity and without legal effect.

6. That any action of E. P. Livingston and Grady Rogers since December 10, 1959, was their action individually and not under color of office as a member of the Board of Registrars of Macon County, Alabama.

7. It is obvious that there are no reasonable grounds to believe that E. P. Livingston and Grady Rogers are about to engage in any act or practice as members of the Board of Registrars of Macon County, Alabama, which would deprive any other person of any right or privilege relating to voting rights, since they are no longer members of said Board of Registrars, and the Civil Rights Act of 1957 requires this as basic jurisdiction.

8. This Court has no jurisdiction over the State of Alabama or of the Board of Registrars of Macon County, Alabama, or E. P. Livingston, or Grady Rogers, as members of said Board, for lack of proper service.

57 9. This Court has no jurisdiction over the subject matter or of the parties.

Movants suggest to the Court the want of jurisdiction over the Board of Registrars of Macon County, Alabama for the additional reasons:

A. The Board of Registrars of Macon County is not a separate suable legal entity but a department or agency of the State of Alabama.

B. The Board of Registrars of Macon County, Alabama is not subject to suit.

C. The Board of Registrars of Macon County, Alabama is a governmental organization of the State of Alabama and is not subject to suit or independent from or distinguished from the State of Alabama.

D. To make the Board of Registrars of Macon County, Alabama a party is in fact and in legal effect to make the State of Alabama a party to this cause.

E. The Bord of Registrars of Macon County, Alabama cannot be served under Rule 4(6) of the Federal Rules of Civil Procedure.

F. The Board of Registrars of Macon County, Alabama is not such an entity as can be served with process or sued.

G. The Board of Registrars of Macon County, Alabama has no officers or agents upon whom service may be made within the subdivision of d(1) or d(3), or d(6) of Rule 4 of the Federal Rules of Civil Procedure.

H. If the Board of Registrars as such can be sued or can be made a party, a suit against said Board is a suit against the State of Alabama.

I. The State of Alabama has not been made a party in this cause or brought into court.

J. The State of Alabama is an indispensable party
58 and this cause lacks jurisdiction therefor.

K. This Court is without jurisdiction over the State of Alabama or the Board of Registrars of Macon County, Alabama for lack of, and in absence of, compliance with the requirements for service under Rule 4(d) 6 of the Federal Rules of Civil Procedure.

L. This action against the Board of Registrars of Macon County, Alabama is in effect a suit against the State of Alabama and your movants are not the proper persons or the authorized individuals upon which service of process may be made to obtain jurisdiction over the State of Alabama.

The movants further suggest to the Court the lack of jurisdiction for the following basic reason, even should proper service be made:

M. This is an action under the Civil Rights Acts of 1957, and by the terms of said Act, action must be against "*individuals*," who, under color of their respective state office, subject another person to denial of Federal Constitutional rights.

N. This Court is without jurisdiction under the Civil Rights Act of 1957 to enterain an action against the State of Alabama or the Board of Registrars of Macon County, Alabama.

O. The suit undertakes to control the State of Alabama and its officers and is forbidden by the 11th Amendment to the Constitution of the United States.

Respectfully Submitted

GRADY ROGERS and
E. P. LIVINGSTON

By:

E. P. ANDRESS
Attorney

MACDONALD GALLION
Attorney General State of Alabama

N. S. HARE
Sp. Ass't. Atty. Gen.

59 CERTIFICATE OF SERVICE

(Omitted in printing)

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60 **Exhibit A.1.—Affidavit of E. P. Livingston**

(Omitted. Printed side page ~~40~~ 33 supra)

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62 **Exhibit A.2.—Affidavit of Grady Rogers**

(Omitted. Printed side page ~~42~~ 35 supra)

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64 **Exhibit B—Subpoena**

(Omitted. Printed side page ~~44~~ 36 supra)

(File endorsement omitted)

65 IN UNITED STATES DISTRICT COURT

(Title omitted)

Motion of Grady Rogers and E. P. Livingston to Dismiss the Complaint—Filed February 20, 1959

Comes defendants, Grady Rogers and E. P. Livingston, personally and in their individual capacity only and in no other capacity, and admit jurisdiction of this Court over them as individuals, but as individuals only and appearing specially for the purpose of this motion and without admission of the jurisdiction or authority of this Court over them in a representative capacity or over the Board of Registrars of Macon County, Alabama, or over the State of Alabama, and move that the complaint heretofore filed in this cause by the plaintiff be dismissed and in support thereof assigns the following grounds separately and severally:

1. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant to the plaintiff the relief prayed for in said bill.

2. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant relief to the plaintiff against the Board of Registrars of Macon County, Alabama.

3. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant relief to the plaintiff against either Grady Rogers or E. P. Livingston in their capacity as members of the Board of Registrars of Macon County, Alabama.

66 4. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant relief to the plaintiff against the State of Alabama, and it appears that the party designated as "The Board of Registrars of Macon County, Alabama," is in law and in fact the State of Alabama.

5. For that it affirmatively appears that this Court is without requisite jurisdiction.

6. For that it affirmatively appears that the questions presented in the bill of complaint are moot.

7. For that it appears that the State of Alabama is an indispensable party to this action.

8. For that it affirmatively appears that this is an action under the Civil Rights Acts of 1957, and by the expressed terms of said Acts, such action must be against individual persons who, under color of their respective State office, subject some person, to denial of Federal Constitutional rights.

9. For that it affirmatively appears that the Civil Rights Acts of 1957 do not authorize action against the Board of Registrars of Macon County, Alabama, or the State of Alabama.

10. For that it affirmatively appears that this Court is without jurisdiction of an action against the Board of Registrars of Macon County, Alabama.

11. For that it affirmatively appears that this suit undertakes to control the State of Alabama and its officers, and is in effect an action against the State and forbidden by the Eleventh Amendment to the Federal Constitution.

12. For that it does not appear from the bill of complaint that there are reasonable grounds to believe that any person is about to engage in any act or practice which
67 would deprive any other person of any right or privilege relating to voting rights, and specifically no facts are alleged showing that defendants Grady Rogers and E. P. Livingston, either individually or under color of their former office as members of the Board of Registrars, are about to engage in such acts or practices.

13. It affirmatively appears from the bill of complaint that defendants, Grady Rogers and E. P. Livingston, vacated their office as members of the Board of Registrars of Macon County prior to the institution of this suit and, therefore, they cannot act under color of such office and cannot engage in any act or practice under the color of such office which would deprive any other person of any right of privilege relative to voting.

14. For that it affirmatively appears that the question or issues as to defendants, Grady Rogers and E. P. Livingston, are moot.

15. For that it appears that any order of this Court in response to any prayer of the bill of complaint would be premature, futile, ineffectual, and without effect.

16. For that it affirmatively appears that there is no party or persons before the Court against whom the requested relief can be granted.

68 Respectfully submitted,

GRADY ROGERS AND E. P. LIVINGSTON, *Defendants*

By—

L. P. ANDRESS
Attorney

MACDONALD GALLION
Attorney General
State of Alabama

N. S. HARE
Sp. Ass't. Atty. Gen.

CERTIFICATE OF SERVICE

(omitted in printing)

(File endorsement omitted)

69 IN UNITED STATES DISTRICT COURT

(Title omitted)

Notice of Intention to Take Oral Testimony—Filed February 20, 1959

Defendants give notice that they intend to give oral testimony at the Hearing on the Motion to Dissolve The

Temporary Restraining Order set Feb. 23, 1959, and on the other Motions before the court.

N. S. HARE
Sp. Asst. Atty. Gen.
State of Alabama

Service of above notice accepted Feb. 20, 1959.

HARTWELL DAVIS
U. S. Attorney

(File endorsement omitted)

70 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Amendment to Complaint—Filed February 23, 1959

Pursuant to the provisions of Rule 15 of the Federal Rules of Civil Procedure, plaintiff, the United States of America amends the complaint filed herein to add as an additional party defendant the State of Alabama and to include the following as paragraphs 3(a) and 17(a) thereto:

3(a). Defendant State of Alabama is a sovereign state of the United States which acts through agents, officials, and agencies, including the registrars of Macon County, Alabama, and those agents, officials, and agencies which have the power and are under the duty to appoint, remove, and control the registrars of Macon County, Alabama. Defendant State of Alabama has the duty under the Constitution and laws of the United States to permit all qualified citizens of the United States in the State of Alabama to vote without distinction of race or color, and to prevent acts or practices by any of its agents, officers, and agencies which deny or abridge the right to vote on account of race or color. Notwithstanding the legal duties aforesaid, Defendant State of Alabama has, for reasons of race or color, persisted in acts and practices which

deprive Negro citizens in Macon County, Alabama, of their rights to vote, and has, acting through the agents, officials, and agencies named in paragraph 10 through 15 of this complaint, engaged in the discriminatory and unlawful practices specified in said paragraphs. A judgment is sought in this action declaring such past acts and practices of Defendant State of Alabama to be illegal under the Constitution and laws of the United States, and enjoining Defendant State of Alabama from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the
71 United States and the decree of this Court.

17(a). There are reasonable grounds to believe that Defendant State of Alabama, through its agents, officials, and agencies, will engage in the illegal acts and practices set forth in this complaint unless enjoined by this Court.

The prayer is amended by adding to section (b) thereof on page 8 of the original complaint immediately after the word "enjoining" the following words:

> . . . the Defendant State of Alabama, through its agents, officials, and agencies, . . .

W. WILSON WHITE JR
W. Wilson White
Assistant Attorney General

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney,
Department of Justice

(File endorsement omitted)

72 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATE OF ALABAMA, ET AL, *Defendants*

Certificate of Service—Filed February 23, 1959

I hereby certify that I have on the 23rd day of February 1959, personally served copies of the following pleadings and memoranda on Nicholas Hare, Esquire, Special Assistant Attorney General of the State of Alabama, by handing him said copies in the Federal Court Building, Montgomery, Alabama:

(1) Amendment to complaint.

(2) Memorandum in Opposition to Motion to Dismiss.

(3) Memorandum of law in support of plaintiff's Motion to Produce.

(4) Memorandum in opposition to Motion to Quash.

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney for Plaintiff

(File endorsement omitted)

73 IN UNITED STATES DISTRICT COURT

(Title omitted)

Amendment of Motion to Dismiss—Filed February 23, 1959

Comes Defendants Grady Rogers and E. P. Livingston in their individual capacity only, as set out more fully in the original motion, and, by leave of Court heretofore had and obtained, amend the motion to dismiss heretofore filed

in this cause on, to wit, February 20, 1959, by making a part of said motion the affidavits of Grady Rogers and E. P. Livingston, attached hereto as Exhibits "A" and "B", which said affidavits in the form of Exhibits "A" and "B" are incorporated into the motion to dissolve by reference.

MacDonald Gallion
MacDonald Gallion
Attorney General

N. S. Hare
N. S. Hare
Special Assistant
Attorney General

L. K. Andrews
L. K. Andrews
Attorneys for Defendants

Certificate of Service

(omitted in printing)

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74 **Exhibit A.1.—Affidavit of E. P. Livingston**

(Omitted. Printed side page ~~10~~ 33 supra)

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76 **Exhibit A.2.—Affidavit of Grady Rogers**

(Omitted. Printed side page ~~12~~ 35 supra)

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78 **Exhibit "B"—Subpoena**

(Omitted. Printed side page ~~14~~ 36 supra)

(File endorsement omitted)

79 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF ALABAMA, et al, *Defendant*

Motion for Order Allowing Amendment—
Filed February 23, 1959

Comes now the Plaintiff, the United States of America, by its Attorneys and moves this Honorable Court for an order allowing plaintiff to amend the Motion to Produce and to permit the Inspection, Copying, and Photographing of Records under Rule 34 filed herein on February 12, 1959, by adding as a Defendant in the caption the words "and The State of Alabama" and by adding to Paragraph 2 of said motion after the word "defendants" the phrase "including the State of Alabama" and for reasons therefor states as follows:

This Court orally gave permission to plaintiff to amend the complaint herein during a hearing in open court on February 23, 1959. Said amendment added the State of Alabama as a defendant. For the purposes of preserving this Court's jurisdiction adequately to dispose of the motion to produce it is necessary that the additional defendant, the State of Alabama be added to the said motion.

Respectfully submitted

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney for Plaintiff

(File endorsement omitted)

80 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Motion to Extend Temporary Restraining Order and to Include Defendant State of Alabama—Filed February 23, 1959

Come now the United States by its attorneys and moves this Honorable Court to extend the Temporary Restraining Order entered in this cause on February 12, 1959, pending disposition of Plaintiff's motion to produce filed herein pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff further moves to amend said Temporary Restraining Order to include Defendant State of Alabama under the terms thereof.

Respectfully submitted

JOSEPH M. F. RYAN, JR.
Joseph M. F. Ryan, Jr.
Attorney, Department of Justice

(File endorsement omitted)

81 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Order Granting Plaintiff's Motion to Amend Its Motion to Produce, and Adding the State of Alabama as a Party Defendant—February 23, 1959

This matter having come on for hearing and the Court having instructed counsel for the plaintiff to file a motion to amend the Motion to Produce in accordance with Rule 34 heretofore filed in this cause on February 12, 1959, and such a motion to amend having been filed, and,

It appearing to the Court that an amendment to the complaint herein has been filed naming as an additional party defendant the State of Alabama, and,

It further appearing that said additional defendant may be a necessary party to any relief which this court might see fit to grant with respect to the disposition of the Motion to Produce,

It is therefore, ADJUDGED, ORDERED and DECREED that Plaintiff's Motion to Amend the Motion to Produce herein be and hereby is granted, and it is,

FURTHER ORDERED that the State of Alabama be and it is added as a defendant in the caption of said motion and is included within the terms Defendants in paragraph 2 of said Motion to Produce.

It is further ORDERED that the Clerk of this Court serve an attested copy of this order along with an attested copy of the Motion to Produce filed in this cause by Plaintiff on February 12, 1959, on the State of Alabama.

Done this 23rd day of February 1959.

FRANK M. JOHNSON, JR.,
Frank M. Johnson, Jr.
United States District Judge

(File endorsement omitted)

82 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Order Amending the Temporary Restraining Order to Include Defendant State of Alabama and Extending Said Order—February 23, 1959

This cause came on to be heard in open court and on Plaintiff's written motion to amend the Temporary Restraining Order filed herein on February 12, 1959, to include Defendant State of Alabama under the terms thereof, and to extend said order pending disposition of Plaintiff's motion to produce filed herein pursuant to Rule 34 of the Federal Rules of Civil Procedure and,

It appearing that the State of Alabama has been joined as a party defendant in this action, and good cause being shown in open court,

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff's motion be and is hereby granted and that said Temporary Restraining Order be and is hereby amended to include Defendant State of Alabama under the terms thereof and that such order as amended be and is hereby extended until and including March 5, 1959.

It is further ORDERED that the Clerk of this Court serve an attested copy of this order along with an attested copy of the Temporary Restraining Order filed in this cause on February 12, 1959, on the State of Alabama, and an attested copy of this order be served on each of other defendants named herein.

Done this 23rd day of February 1959.

FRANK M. JOHNSON, JR.,
Frank M. Johnson, Jr.
United States District Judge

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84 **Government's Exhibit No. 1**

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Case No. 479-E

UNITED STATES OF AMERICA

vs.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS

Deposition of TOM F. YOUNG, taken pursuant to an agreement of counsel (SEE STATEMENT OF MR. DAUGHTRY NEXT FOLLOWING APPEARANCES) on behalf of the plaintiff, before Glynn Henderson, Official Court Reporter for the United States District Court for the Middle District of Alabama, at Montgomery, Alabama, on February 22, 1959, beginning at 2:30 p.m.

APPEARANCES:

For the Plaintiff: Hartwell Davis, United States Attorney, and Ralph M. Daughtry, Asst. United States Attorney.

For the Defendants: (See Statement of Mr. Daughtry next.)

MR. DAUGHTRY: This statement is made for the record: I talked to Mr. Nicholas Hare, Special Assistant Attorney General for the State of Alabama, and of counsel in this case, on February 21, 1959, with reference to taking of the deposition of Mr. Tom F. Young, Circuit Solicitor
85 of Macon County, Alabama, on February 22, 1959, at two thirty, p.m., in the Post Office Building, Montgomery, Alabama. At that time, Mr. Hare advised me that counsel for the respondents would waive all notice and formalities in the taking of said deposition of Mr. Young. That is all.

TOM F. YOUNG, called as witness by the plaintiff, having been duly sworn, testified as follows:

Direct Examination:

By Mr. Davis:

Q. What is your name? A. Tom F. Young.

Q. What is your occupation? A. I am Circuit Solicitor of the Fifth Circuit of the State of Alabama, Fifth Judicial Circuit.

Q. What—does that Circuit include Macon County? A. Yes, sir.

Q. Alabama? A. Yes, sir; four others.

Q. Mr. Young, where do you live? A. I live in Alexander City, Alabama.

Q. Do you have your principal office there? A. Yes, sir.

Q. Mr. Young, how long have you been Circuit
86 Solicitor of the Fifth Judicial Circuit? A. I have been Circuit Solicitor for four years, and am commencing on my new term as Circuit Solicitor for the Fifth Circuit.

Q. Did that term commence on January 19? A. Yes, sir.

Q. Mr. Young, were you Circuit Solicitor of the Fifth Judicial Circuit on the 3rd day of December, 1958, and since that time? A. Yes, sir.

Q. On the 3rd day of December—strike that please. I will show you a paper marked Exhibit B and attached to—a copy of which is attached to motion to strike and

to quash answer to or objection to the motion to produce and another paper called motion to dissolve the temporary restraining order, each of these three papers has been filed in case pending in the United States District Court for the Middle District of Alabama entitled United States of America, plaintiff, against Board of Registrars of Macon County, Alabama, Grady Rogers, E. P. Livingston, Registrars, defendants, Number 479-E; I will ask you to look at that paper. That paper is marked Exhibit B to each of the three papers referred to. A. Yes, sir.

Q. Mr. Young, what is that paper? A. That paper is a copy of a subpoena which I issued on the 8th day of December of 1958.

Q. Was that witness—issued on the 8th or the 3rd, Mr. Young? A. 3rd—3rd, it is—

87 Q. Just a moment, please. All right. All right, sir, tell us, please, sir, just what the paper is? A. This is a subpoena duces tecum which I prepared or had prepared for the attachment—for the purpose of attaching the records of the Board of Registrars of Macon County, Alabama. In my recollection, it was served on about the 8th day of December of 1958, the date being on the 3rd of December, or the date of the instrument.

Q. Mr. Young, do you know who served this paper? A. It was served by the Sheriff of Macon County, Alabama.

Q. Did he take the records, books, and dossiers pertaining to and maintained by E. P. Livingston as a member of the Board of Registrars for Macon County, Alabama, into his custody? A. Yes, sir; at my direction.

Q. Yes, sir. Now, when did he take them into his custody? A. I believe it was on the 8th day of December, 1958.

Q. Was this paper made— A. I would like to say this; it was on the day of a hearing here in Montgomery. As I recall it, that date was the 8th.

Q. Did this paper that you issued that is marked—the copy of which is marked Exhibit B and which we will refer to from now on for the purpose of brevity as Exhibit B— A. (Nodded to indicate affirmative response)

Q. —what was the occasion of your issuing that

88 subpoena duces tecum? A. At this time I had read of and heard orally of a charge made by certain

parties from Macon County, or alleged to have been made by certain parties from Macon County, Alabama, claiming that they were discriminated against by the Board of Registrars of Chambers—of Macon County, Alabama, and I being a State Solicitor representing Macon County, Alabama, felt that if any such thing was going on that it was place for the State Court to—it was a matter for the State Court to look into. I attached these records with my personal intentions being to turn them over to the coming Grand Jury of Macon County, Alabama.

Q. Now, after the Sheriff took the records into his custody, did you see them? A. Yes, sir; I have had custody of the records.

Q. Do you have the custody of the records at this time? A. Yes, sir.

Q. Where are they located? A. They are located in the office for the Board of Registrars of Macon County at Tuskegee, Alabama.

Q. Do you—if they are there, do you have them in your direct custody and control? A. Yes, sir.

Q. I mean personally or— A. Not—no, sir; only as the Solicitor for the Fifth Judicial Circuit.

89 Q. Under this subpoena? A. Sir? As a—as a consequence—as a consequence of the—of this subpoena that I issued.

Q. Are these—you are not—you do not have them in your physical custody, do you? A. At this time, no, sir.

Q. And during most of the time since they have been attached they have not been in your physical custody, have they? A. No, sir.

Q. Whose physical custody have they been in during most of that time? A. They have been in no one's physical custody in the way I interpret physical custody; they have been in my custody in the court house at Macon County, in a office and in files to which I have the keys.

Q. In whose office are they kept? A. This is in the Board of Registrars office, which has been vacated by the members of the Board, and the keys and all the material of this office, files, are in my possession; I consider them in my possession.

Q. Do you—do you have anyone else who has a key to that office? A. The Sheriff of Macon County, Alabama,

under the law is custodian of the court house, and I believe that as custodian he has a key to every office.

Q. Have you got the other keys to that office?

90 A. Yes, sir.

Q. Does anyone else have any to the best of your knowledge? A. Not to my knowledge.

Q. Mr. Livingston? A. I understand there were—there was a set of keys that was misplaced some—during the lifetime of Mr. Zachary. Now, I may be incorrect in exactly who lost these keys, but it seems to me that Mr. Zachary, the deceased member of the Board—

Q. Was the keys of—did Mr. Livingston and Mr. Rogers, Mr. Grady Rogers, each have a set of those keys? A. All I know is on the day I received the keys, I had—incidentally at that time I had the records of this office in my custody stored in a vault, at my direction, and as I recall it, Mr. Livingston was the one that turned the keys over t[illegible] and there were two sets of these keys; I don't recall Mr. Rogers giving me any keys.

Mr. Davis: Off the record, wait just a minute.

Q. Mr. Young, how many rooms are reserved for the Registrars in Macon County, in the court house? A. At one time—I can't say, all I know is that at this time there is one room reserved for the Board of Registrars.

Q. Do you know how many rooms were reserved for the Board of Registrars when these records were attached by you under this subpoena duces tecum, or taken into your custody? A. All I know is that when I took

91 that possession of these keys I went to one room, I opened the door with one of the keys on the key ring and I saw no other room, and the files of this office were all contained in this one room.

Q. Is that the only room that you have seen the Board of Registrars use before that time? A. Yes, sir. And that is—however, as you know, I am not a resident of Macon County, Alabama; I am there only on occasion of court or some matter that pertains to my duties as Circuit Solicitor; I couldn't testify as to what the Board of Registrars uses or has used in the past.

Q. Has there been any other papers filed in this matter under which you brought this subpoena duces tecum? A. I only filed one paper, I mean one—at one instant I

filed—served two papers, one on Grady Rogers and one on Mr. Livingston; I say I served them, I had them served.

Q. Is this this Exhibit B that you are speaking of? A. Now, I don't know that this is the copy of—exact copy of that subpoena; as I recall it, I am certain my name was signed on the subpoena—subpoenaes. Now—.

Q. Do you see any difference between that and the one you served, or is that, to the best of your knowledge, identical—an identical copy as the State alleges it to be, or is—strike that statement, make it respondents allege it to be? A. Well, there is not such—

Q. Before you answer that. (Showed witness document) A. May I ask this question off the record?

92 Q. Yes.

(Off the record discussion held at this point)

A. The wording on Exhibit B, I believe that is the correct classification for this, appears to be exactly the same as the papers or the original subpoena which I issued on these two parties. The wording and the markings are—of the paper seem to be.

Q. In other words, it is exactly the same except it doesn't bear your signature? A. Signature, yes, sir.

Q. I see. A. I mean, as I recall it.

Q. Was there any complaints filed in this matter, in which you filed this subpoena duces tecum? A. No, sir; only in Federal Court. There was a matter, as you know, at that time pending in the Federal Court wherein complaints had been made against the Board of Registrars of Macon County, Alabama, and I—it was my intention at that time to have a Grand Jury, the next session of the Grand Jury of Macon County, Alabama, investigate any such claims or any such accusations made by parties who had complained to the Civil Rights Commission. I might say this, that I felt that had there been any bona fide claims that these parties would have come to me initially rather than going to the Civil Rights Commission.

93 Q. Mr. Young, to get the record straight, that matter, that was not pending in the Federal Court on the 3rd day of December, but was pending before the Civil Rights Commission in Montgomery. A. Yes, sir; I stand to be corrected.

Q. All right. Now, did you ever file any complaint in this matter in which you commanded E. P. Livingston here in Exhibit B as shown in Exhibit B to deliver these records to you—to you? A. No, sir.

Q. Not then or at any time since then? A. No, sir; however, the Grand Jury has not met.

Q. You are still holding them for the Grand Jury? A. Yes, sir.

Q. All right. A. Grand Jury will meet in something like a month from now.

Q. Now, have you filed any proceeding before either of the Judges of the Fifth Circuit to impound the records which you had delivered to you under this subpoena duces tecum, marked Exhibit B? A. I will say that I have merely discussed the matters with the Circuit Judges, the two Circuit Judges, incidentally we have three now.

Q. Yes. A. But at that time we had two. And
94 I did discuss the matter and these alleged claims of abuse on certain parties by the Board of Registrars, I have discussed that, and I still say that it appeared to me that if there was any such discrimination as claimed by these complainants in the Civil Rights Commission basing their proceedings on, it seems to me that I would have heard at least in one instance about them. I would like for the record to show that as Solicitor I have not in four years, I have not had the first claim made to me by any party, colored or white, in Macon County that they were being discriminated against and that they were not being allowed to register.

Q. Now, just to get the record clear, did you file any proceeding before any of the Judges of the Fifth Judicial Circuit to impound these records? A. No, sir.

Q. All right. A. I discussed the matters with the Circuit Judges.

Q. Yes, sir; just—that is enough. A. Under the law of the State of Alabama, I have the right of this process.

Q. Mr. Young, were you the—you have stated that you were the custodian of these records from the 8th of December to date, so you were the custodian of them on January 6 and 7th, 1959? A. Yes, sir.

Q. Mr. Young, were you present when Civil Rights
95 Agents, Colonel A. H. Rosenfeld— A. (Nodded to indicate affirmative response)

Q. —and others examined these records? A. At all times.

Q. And did they examine them in the court house in Macon County, Tuskegee, Alabama? A. Yes, sir; in the Grand Jury room.

Q. Did you relinquish the custody of the records at any time during that time? A. Yes, sir; upon the—as far as the custody; no, sir.

Q. You allowed them to look at them? A. I allowed them to look at them under the direction of Honorable Frank M. Johnson, Judge of the Federal Court in the Middle District.

Q. And did they photostat the records, some of the records, or copy them? A. At that time they had a—on the last day that they were there they had a photostat machine with them, and they took—rather, it appeared to me that they were taken, and they went through the process of taking photostats, whether or not these were any good I don't know.

Mr. Davis: Off the record one minute.

(Off the record discussion held at this point)

Q. At that time were E. P. Livingston and Grady Rogers present? A. Yes, sir; Mr. Livingston was present
96 most of the time; Mr. Rogers was present on the—I will say about approximately half of the time.

Q. What were they doing there? A. They were there at the same—for the same reason that I was there, at the request of—I took it to be the Court, Federal Court, and at the request, I believe, of Colonel Rosenfeld.

Q. And that was on January 6 and 7, 1959, Tuesday and Wednesday? A. As I recall the date; yes, sir.

Q. Now, did Mr. Rogers or Mr. Livingston take any control of these records at that time? A. No, sir.

Q. Since you are the custodian of the records at present, will you please tell us whether they are being used in any way at this time? A. No, sir; they are not, not that I know of, I don't see how they could be.

Q. When were they last used? A. Now, may I ask you what you mean by used?

Q. When were they last inspected by anyone? A. In my presence some three weeks ago, I went to Tuskegee and met there with Mr. Malone of the Attorney General's

office, and Mr. Ed Strickland, I met them at their request, and they were allowed to look at the applications of the complaining witnesses who had appeared before the Civil Rights Commission.

97 Q. From that time— A. And they—that is all that they looked at.

Q. From that time until this date, have they been inspected by anyone? A. Not to my knowledge.

Q. Well, you are the custodian? A. Yes, sir.

Q. Now, from January 7 until that time, were they inspected by anyone? A. From January 7—

Q. Until you went there with Mr. Malone and Mr. Strickland three weeks ago, were these records inspected by them? A. Yes, sir; on the 9th day of December.

Q. I said from January 7— A. Oh—now, I have been in that room, myself, and I have checked the files there; I understood they were—they were painting in the building at the time, and I went in and checked the files and now I believe that the—on or about the—I don't recall the date, I believe Mr. Malone went there to—for the purpose of photostating these records. Now, if that is what you mean, the records that he had looked at.

Q. After—after the time three weeks ago you are speaking of? A. I was in court in Alexander City at the time, and I will have to correct one thing; I have

98 not had the custody of these keys every minute of the time. I have had—there has been a matter of a few days that I have not had custody of these keys since then.

Q. Otherwise, has anyone seen these records, except Mr. Malone and Mr. Strickland since the 7th day of January? A. No, sir. Not to my knowledge; as I say, I don't know.

Q. Well, you—you are the custodian? A. Yes, sir.

Mr. Davis: All right, that is all.

TOM F. YOUNG
Deponent

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

I, Glynn Henderson, Official Court Reporter for the United States District Court for the Middle District of Alabama, hereby certify that the foregoing 15 pages constitute a true and correct transcript of the deposition of Tom F. Young, which deposition was taken before me as stated in the caption, the witness having been sworn prior to his testimony by me to tell the truth, the whole truth, and nothing but the truth; I further certify that the witness has, in my presence, read and duly signed his deposition.

This 22nd day of February, 1959.

GLYNN HENDERSON
Official Court Reporter,
Middle District of Alabama.

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99 **Order Amending the Temporary Restraining Order to Include Defendant State of Alabama and Extending Said Order—February 23, 1959**

(Omitted. Printed side page 55 *supra*)

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100 **Marshal's Returns on Service of Writ**

(Omitted in printing)

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104 **Order Granting Plaintiff's Motion to Amend Its Motion to Produce, and Adding the State of Alabama as a Defendant—February 23, 1959**

(Omitted. Printed side page 54 *supra*)

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105 **Marshal's Return on Service of Writ**

(Omitted in printing)

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106 **Plaintiff's Motion to Produce and to Permit the Inspection, Copying and Photographing of Records Under Rule 34, Federal Rules of Civil Procedure—Filed February 12, 1959**

(Omitted. Printed side page 16 *supra*)

109 **Exhibit A—Affidavit of Joseph M. F. Ryan, Jr.**

(Omitted. Printed side page 18 *supra*)

112 **Marshal's Return on Service of Writ**

(Omitted in printing)

113 **Order Amending the Temporary Restraining Order to Include Defendant State of Alabama and Extending Said Order—February 23, 1959**

(Omitted. Printed side page 55 *supra*)

114 **Temporary Restraining Order—February 12, 1959**

(Omitted. Printed side page 24 *supra*)

117 **Marshal's Returns on Service of Writ**

(Omitted in printing)

(File endorsement omitted)

118 Summons in a Civil Action

IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action File No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATE OF ALABAMA, ET AL., *Defendants*

Summons and Marshal's Return—Filed February 26, 1959

To the above named Defendant:

You are hereby summoned and required to serve upon Hon. W. Wilson White, Assistant Attorney General, plaintiff's attorney, whose address is 216 Post Office Building, Montgomery, Alabama, an answer to the complaint as amended which is herewith served upon you, within Twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judg-

ment by default will be taken against you for the relief demanded in the complaint.

R. C. DOBSON
Clerk of Court.

ANNIE SCHOOLAR
Deputy Clerk.

[Seal of Court]

Date: February 23, 1959

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

119 **Return on Service of Writ**

I hereby certify and return, that on the 23rd day of February, 1959, I received this summons and served it together with the complaint herein as follows: on February 24, 1959 at 11:45 AM, I served a copy thereof, with a copy of the complaint dated Feb. 5, 1959 and copy of amended Complaint dated Feb. 23, 1959 on John Patterson, Governor, State of Alabama by handing copies to him in his office at Capitol Building, Montgomery, Alabama.

CHARLES S. PRESCOTT
United States Marshal,

By JACK S. JOHNSON
Deputy United States Marshal.

Marshal's Fees

Travel	$ .20
Service	2.00
	2.20

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

(File endorsement omitted)

120 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, AND THE STATE OF ALABAMA, *Defendants*.

Motion of the State of Alabama to Dismiss the Complaint—Filed March 4, 1959

Now comes the State of Alabama and moves the Court to dismiss the complaint filed in this cause on the following separate and several grounds, to wit:

1. The complaint fails to state a cause of action against defendant upon which relief can be granted.

2. The action should be dismissed on the ground that the Court lacks jurisdiction.

3. It affirmatively appears that the allegations do not state a cause of action or grounds upon which relief may be had against this defendant.

4. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant to the plaintiff the relief prayed for in said bill.

5. For that it affirmatively appears from the allegations of the bill of complaint that this Court is without jurisdiction to grant relief to the plaintiff against the State of Alabama.

121 6. For that it affirmatively appears that this Court is without requisite jurisdiction.

7. For that it affirmatively appears that the questions presented in the bill of complaint are moot.

8. For that it affirmatively appears that this is an action under the Civil Rights Acts of 1957, and by the expressed terms of said Acts, such action must be against individual "persons" who, under color of their respective State office, subject some person to denial of Federal Constitutional rights.

9. For that it affirmatively appears that the Civil Rights Act of 1957 do not authorize action against the Board of Registrars of Macon County, Alabama, or the State of Alabama.

10. For that it affirmatively appears that this suit undertakes to control the State of Alabama and its officers.

11. For that it does not appear from the bill of complaint that there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege relating to voting rights, and specifically no facts are alleged showing that defendants Grady Rogers and E. P. Livingston, either individually or under color of their former office as members of the Board of Registrars, are about to engage in such acts or practices.

12. For that it appears that any order of this Court in response to any prayer of the bill of complaint would be premature, futile, ineffectual, and without effect.

13. For that it affirmatively appears that there is no party or persons before the Court against whom the requested relief can be granted.

122 14 (a). It appears that the plaintiff is a mere volunteer.

(b) This is a civil action and it has not been shown that plaintiff is suffering any injury or has any direct interest.

15. It appears that the plaintiff is not the real party in interest.

16. It appears that this is a vicarious controversy, or is not properly before the Court, or is moot as to the parties before the Court.

17. It appears that the real parties in interest are certain citizens of the State of Alabama and that the plaintiff is only a nominal plaintiff bringing this suit for and on behalf of said citizens or is affording a conduit through which these particular citizens of Alabama are asserting certain rights or alleged violations of rights personal to themselves, and, therefore, this Court will not entertain the suit, it being a suit against a state by citizens of that state.

18. It appears from the wording of the Civil Rights Act of 1957 that states are not proper parties.

19. It appears from the wording of the Civil Rights Act of 1957 that states are not included as parties for the additional reason that paragraph (d) of Section 1971 of Title 42, U.S.C. confers exclusive jurisdiction on the district courts of the United States which would violate Section 2 of Article III of the Constitution of the United States if the states could be parties under said Act.

20. The judicial power of this Court is limited to actual controversies by adverse litigants.

21. It appears that under the pleadings in this cause this Court could not form a conclusive or final judgment and the matter is not in such form that the Court is capable of acting upon it.

123 22. Article III, Section 2, Clause 2, of the Constitution of the United States confers original jurisdiction on the Supreme Court in all cases to which a state may be a party.

23. The "party aggrieved" by alleged acts of practices mentioned in the Civil Rights Act of 1957 could not sue the State and it can not be presumed that Congress intended to create a cause of action in favor of the United States for the benefit of other persons so as to evade the prohibition of a citizen sueing his state.

24. The district courts will not entertain this suit by the United States of America against a state for reasons of comity.

25. The district courts will not entertain a suit by the United States against a state involving a political question.

26. A district court will not exercise general supervisory control or power over a state government.

27. This Court has no jurisdiction over the governmental functions of a state.

28. A district court will not entertain a suit by the United States of America against a state to interfere with or to control by supervision the executive or administrative branches of government.

29. Under the separation of powers provided in the Constitution of the United States, it is not a judicial function for the courts to perform the ordinary duties of an executive branch or administrative department of the government, particularly those of state governments.

30. It appears that the question or matters involved in this cause are speculative, abstract, contingent or hypothetical.

31. The judicial powers of this court do not include control over a state government, particularly where
124 the case is not clear or where reasonable doubt exists about the propriety of the court assuming jurisdiction or of an interference by the courts.

32. A district court will not entertain a suit by the United States against a state involving only governmental function as distinguished from a proprietary interest.

33. The Civil Rights Act of 1957 (71 Stat. 634, 42 U.S.C. Sec. 1971) under which this complaint is filed is unconstitutional and void in that it is in violation of the 10th or 11th or 15th Amendment to the Constitution of the United States.

34. Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is unconstitutional and void in that it is in violation of the 10th or 11th or 15th Amendment to the Constitution of the United States.

35. Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is unconstitutional and void in that it is not appropriate legislation under the 15th Amendment to the Constitution of the United States, said Part IV relating to "persons" and not state action

as provided in said Amendment and makes no reference whatsoever to denial or abridgment of voting rights because of race or color.

36. Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is unconstitutional or invalid in that it refers to the denial or abridgment of voting rights by "persons" as distinguished from such denial or abridgment by the United States or by any state as provided in the 15th Amendment to the Constitution of the United States.

37. Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is unconstitutional or invalid in that it in no place refers to or is limited
125 to the denial or abridgment of voting rights on account of race, color, or previous condition of servitude as provided in the 15th Amendment to the Constitution of the United States.

38. Part IV of the Civil Rights Act of 1957, under which this action is brought, does not provide for such an action against a state for the denial or abridgment of voting rights by a state on account of race, color, or previous condition of servitude, and is not appropriate legislation under the 15th Amendment to the Constitution of the United States.

39. This Court is without jurisdiction to hear and determine this action for the reasons stated in 33, 34, 35, 36, 37 and 38 above, or some one or more of the grounds set forth therein which are hereby assigned by reference.

40. This Court is without jurisdiction to hear and determine this cause in that Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) is not appropriate legislation under the 15th Amendment to the Constitution of the United States is that it does not refer or relate to the denial of voting rights by a state on account of race, color or previous condition of servitude.

41. The Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) attempts to confer exclusive jurisdiction to district courts which contravenes Article III, Sec. 2, Clause 2, of the Constitution of the United States which gives the Supreme Court of the United States

original jurisdiction in all cases in which a state shall be a party.

42. It affirmatively appears that if there be any discrimination in voting rights, such action can not be attributed to the State of Alabama in view of the statutory and constitutional direction to the individual officers
126 conducting registration, said constitutional and statutory provisions being attached to and made a part of the plaintiff's complaint.

43. It appears from the complaint that the injunction sought by plaintiff against the State of Alabama goes beyond the discretionary or equitable power of this Court.

44. Unless the Civil Rights Act itself grants equitable jurisdiction to this Court to proceed against a state, and it does not, the common law or traditional limits of proceedings in equity do not extend to the equitable relief sought here against a state, including relief against alleged political wrongs.

45. Injunctive relief ordinarily will not be granted where it is not clear that the Court can enforce the kind of injunction prayed for.

46. It does not affirmatively appear therefrom that the United States of America had any legal right to commence it, or that the United States of America has any legal right to prosecute it.

47. It does not affirmatively appear therefrom that the defendants have engaged, or there are reasonable grounds to believe that the defendants are about to engage in any act or practice which would deprive any person of any right or privilege secured by subsections (a) and (b) of Title 42, Section 1971 of the United States Code.

48 (a) In the absence of the Civil Rights Act of 1957, and those portions of it, codified as Title 42, Section 1971 (c) and (d), United States Code, the United States of America could not possibly have had any right to commence and prosecute this action;

(b) No provision of the Civil Rights Act of 1957 authorized the United States of America to commence and prosecute this action, for the rule, unchanged by

127 the Civil Rights Act of 1957, is that whether a person, resident of and a citizen of Alabama, is entitled to be registered for the purpose of voting is determined solely by weighing his or her qualifications and disqualifications by standards outlined in the Constitution and Statutes of Alabama, and the question of alleged unconstitutional discrimination in registration cannot be determined by classes or groups of individuals as this action attempts to do, but must be determined as to each individual.

49. The Court lacks jurisdiction for that even under the Civil Rights Act of 1957, a suit may not be instituted in the name of the United States for preventive relief to a group or class of persons.

50. The allegations of the complaint and the applicable law, even if the applicable law plead is constitutional, do not warrant the relief sought.

51. The action does not seek preventive relief, but seeks with respect to the only parties named therein to have the Court review and reverse past decisions of the Board of Registrars of Macon County, Alabama, as to the eligibility of the alleged citizens of the United States to register under Alabama registration statutes. Therefore the action is not within the purview of Part IV of the Civil Rights Act of 1957 (42 United States Code, 1971 (e)).

52. Those provisions of Part IV of the Civil Rights Act of 1957, now codified as Sections 1971 (c) and (d) of Title 42 of United States Code, are unconstitutional and void, and exceed the legislative powers delegated by the States to the Congress of the United States, in that the aforesaid provisions purport to authorize the institution of an action by the United States of America in the District Courts of the United States, which action is not within the scope of the judicial powers delegated by the States to the United States by the Constitution of the United States, which provides that the judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States and Treaties made, or which shall be made under their Authority

128 The proceeding sought to be authorized by the statute aforesaid is not such a case in Law and Equity as was and is contemplated or authorized by the Constitution of the United States.

53. The action is not one cognizable by the Courts of the United States under the judicial power delegated by the States to the United States. The action is not a case, in Law or Equity, arising under the Constitution or Laws of the United States, or any treaty made under their authority.

54. Even if Part IV of the Civil Rights Act of 1957 should be held constitutional, even if the actions should be held to be a case, in Law and Equity, arising under the statute, even if the relief sought in the action is held to be within the purview of such action as is authorized by the statute, even if equitable power has been constitutionally delegated to the Court, the Court has the discretionary power to refuse to exercise that equitable power and so interfere with functions which are historically reserved to the States under Article II in Amendment 10 of the Constitution, and this Honorable Court should therefore refuse to entertain the action and grant relief sought.

55 (a). That portion of the Civil Rights Act of 1957 which is now codified as Title 42, Section 1971 (a), is unconstitutional and void, and beyond the powers of Congress to enact, in that it is too comprehensive as an exercise of relative power under the 15th Amendment to the Constitution of the United States, and no other provision of or Amendment to the Constitution of the United States would authorize Congress to enact that portion of the Civil Rights Act of 1957;

(b). It is not alleged that any of the defendants are intimidating, threatening, coercing, or attempting to intimidate, threaten or coerce any other person for the purpose of interfering with the right of such other person to vote, or to vote as he may choose, or of causing
129 such other person to vote for or not to vote for any candidate for the office of President, Vice President, Presidential elector member of the Senate or member of the House of Representatives, delegates or commissioners from the Territories or Possessions, at any general, special

or primary election held solely, or in part, for the purpose of selecting or electing any such condidate. Therefore, the Attorney General had not the power under Section 1971 (c) of Title 42 of the United States Code to institute for or in the name of the United States this action or proceeding.

56. The allegations in Paragraph 15 of the complaint, and the relief based thereon sought in Paragraph 17 of the complaint, and especially in sub-paragraph (b) of said Paragraph 17, the action is one against the State of Alabama, forbidden by the 11th Amendment to the Constitution of the United States which provides that the judicial powers of the United States shall not be construed to extend to any suit in Law or Equity, commenced or prosecuted against any one of the United States.

57. Part IV of the Civil Rights Act of 1957 is unconstitutional and void as being contrary to the 10th Amendment to the Constitution of the United States for that in it the Congress of the United States seeks to exercise functions which were reserved to the States under the aforesaid 10th Amendment.

58. This Court has no original jurisdiction in a mandamus proceeding against the State of Alabama and the requested injunction is in effect a mandatory injunction or a writ of mandamus.

130 Respectfully submitted,

STATE OF ALABAMA

By:

MACDONALD GALLION
MacDonald Gallion
Attorney General, State of Alabama

N. S. HARE
Nicholas S. Hare
Special Assistant Attorney General

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

13] IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Motion to Extend Temporary Restraining Order Herein as to the State of Alabama, Its Officers, Agents and Employees—Filed March 5, 1959

Comes the United States by its attorneys and moves this Honorable Court to extend the temporary restraining order entered herein on February 23, 1959, insofar as the same pertains to the defendant State of Alabama, its officers, agents and employees, and for reasons therefor states as follows:

1. The Court herein has under consideration several motions pending the disposition of which, upon request of counsel for the plaintiff, this Court issued a temporary restraining order against the State of Alabama in order to preserve the status quo.

2. Said restraining order, by its own terms, was effective to and including March 5, 1959.

3. It appears that the disposition of the motions which the Court has under consideration will not occur before the expiration of said temporary restraining order.

4. In order to preserve any right of the plaintiff herein, it is necessary that a second restraining order of 10 days be entered against the defendant State of Alabama, its officers, agents and employees.

Respectfully submitted

JOSEPH M. F. RYAN, JR.,
Joseph M. F. Ryan, Jr.,
Attorney, Department of Justice

(File endorsement omitted)

132 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Order Extending the Temporary Restraining Order—March 5, 1959

A motion having been made by the attorneys for the plaintiff, the United States, herein to extend the temporary restraining order entered herein against the State of Alabama on February 23, 1959, and it appearing that pending disposition of matters presently before the Court, in order to preserve the status quo, that such restraining order should be extended until this Court has adjudicated the matters before it or for a period not to exceed 10 days in any event,

It Is, therefore, Ordered, Adjudged and Decreed that such restraining order be, and the same is hereby, extended to and including March 16, 1959, or until this matter is adjudicated, whichever occurs first.

It is further Ordered that the United States Marshal serve an attested copy of this order on the State of Alabama by serving such copy on the Attorney General of the State of Alabama.

Done this 5th day of March 1959.

Frank M. Johnson, Jr.,
Frank M. Johnson, Jr.,
United States District Judge

(File endorsement omitted)

133 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 479-E

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

STATE OF ALABAMA; THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, *Defendants*.

Memorandum Opinion—March 6, 1959

This is an action by the United States, as plaintiff, against Grady Rogers and E. P. Livingston—each as a member of the Board of Registrars of Macon County, Alabama—The Board of Registrars of Macon County, Alabama, and the State of Alabama, as defendants.

The action is brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 42 U.S.C.A. 1971(c))[1] to obtain preventive relief against acts and practices by the named defendants which deprive other persons of rights and privileges secured by § 1971(a) of Title 42, U.S.C.A., namely, the right and privilege of citizens of the United States, who are otherwise qualified by law to vote at any election by the people in the State of Alabama, to be entitled and allowed to vote at all such elections without distinction of race or color.

The plaintiff says that each of the named defendants, being under a constitutional obligation to fulfill certain duties and obligations relative to registering qualified applicants of Macon County, Alabama, to vote without

[1] § 1971(c). "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

regard to considerations of race or color, has, for many years, persisted in acts and practices in violation of this constitutional obligation, which acts and practices have resulted in depriving qualified citizens of their right to vote solely because of their race and color.

Originally the action did not include the State of
134 Alabama as a defendant. However, the action was, pursuant to the provisions of Rule 15 of the Federal Rules of Civil Procedure, amended on February 23, 1959, to add as an additional party defendant the State of Alabama.

Plaintiff details the "acts and practices" the defendants are alleged to engage in violation of their constitutional obligations and seeks to have this Court adjudge those acts and practices to be in violation of the constitution and laws of the United States and to declare that said defendants are under a legal duty not to engage in, or permit its agents, officials and agencies to engage in such practices. Plaintiff also seeks to have this Court permently enjoin the named defendants, or any of the defendants' agents, officials, and/or agencies from engaging in said acts and practices.

On February 12, 1959, the plaintiff, by appropriate motion and supporting documents, moved this Court for an order directing the defendants to produce and permit the inspection, copying, and photographing of certain records, documents, and papers. This Court, upon proper application, issued on February 12, 1959, a temporary restraining order pending disposition of said motion to produce, restraining the defendants and/or their agents from destroying or otherwise rendering unavailable certain voting and registration records and other enumerated documents made and received by the Macon County, Alabama, Board of Registrars since January 1, 1954. The motion to produce, the order that was entered upon the motion to produce, and the temporary restraining order were amended on February 23, 1959, to include defendant State of Alabama.

The defendants Rogers, Livingston, and The Board of Registrars of Macon County, Alabama, separately and severally (1) move to dismiss the action as to each of

them (amended February 23, 1959); (2) move to "strike and quash" the service upon each of them of the various papers in this cause; (3) object to plaintiff's motion to produce; and (4) move to dissolve as to each of them the temporary restraining order issued by this Court on February 12, 1959. The defendant State of Alabama also moves to dismiss the action as to it.

All of said defendants' motions and objections are now submitted to the Court upon the pleadings, certain affidavits and documents attached thereto, evidence by deposition, written briefs of all parties, and oral arguments of counsel.

Considering first the defendants Rogers, Livingston, and The Board of Registrars' amended motion to dismiss, with the supporting affidavits of the defendants Rogers and Livingston, it appears that said motion cites some
135 sixteen grounds in support thereof. The grounds fall into four general categories.[1] They are: (1) The State of Alabama is an indispensable party; (2) the action is precluded by the Eleventh Amendment to the Constitution of the United States; (3) no relief can be had against defendants Rogers and Livingston because they had resigned; and (4) the Civil Rights Act of 1957 authorizes suits only against individual persons.

Because of the conclusions hereinafter reached by this Court, it will not be necessary in connection with the motions of Rogers, Livingston, and The Board of Registrars, to discuss or decide the questions involved in the first two catagories.

Proceeding then to the third category of points (i.e., no preventive relief should be granted against Livingston and Rogers because they had resigned as registrars), the evidence presented—in the form of uncontroverted affidavits—shows that the members of the Board of Registrars of Macon County, Alabama, prior to December 10, 1958, were Grady Rogers and E. P. Livingston, the third member having died.[2] On December 10, 1958,[3] Livingston and

[2] In Alabama, registration of voters in each county is conducted by "a board of three reputable and suitable persons . . ." Title 17, § 21, 1940 Code of Alabama, as amended.

[3] Approximately two months before this case was filed.

Rogers each tendered to the appointing authority[4] a written resignation as a member of the Board of Registrars of Macon County, Alabama. Said resignations were submitted during a controversy between the Commission on Civil Rights and certain Alabama officials, including Livingston and Rogers, over the right of said Commission to inspect and copy some of the same records the plaintiff in this case now seeks.[5] Both Rogers and Livingston now say that said resignations were absolute and unconditional; that they were made in good faith, and that neither intends to serve again as a member of the Board of Registrars; that said resignations have been accepted by the appointing board, and that each of them has qualified and begun serving in two other public offices.[6] Both Livingston and Rogers testify that all of the records now sought by plaintiff were turned over to the sheriff of Macon County,
136 Alabama, by them on December 8, 1958; that such action by them was in response to a *subpoena duces tecum* issued at the instance of Tom F. Young; Circuit Solicitor of the Fifth Judicial Circuit of Alabama. Solicitor Young testifies by deposition in this cause and the effect of his testimony is to substantiate that part of Livingston's and Rogers' testimony. Solicitor Young unequivocally states that he now has the custody of said records and that said records are in a locked room in the courthouse of Macon County, Alabama.

[4] Appointing authority in Alabama is vested in the governor, auditor and commissioner of agriculture and industries, or by a majority of them acting as a board of appointment. See Title 17, § 21, 1940 Code of Alabama, as amended.

[5] In Civil Action No. 1487-N, styled In re: George C. Wallace, et al., this court on January 5, 1959, ordered these same two defendants to make said records available; said order was complied with, and both Livingston and Rogers were dismissed from said action.

[6] Rogers was in May, 1958, nominated for and in November, 1958, elected to the Alabama House of Representatives; he was sworn in and commenced serving as such official in January, 1959. Livingston was appointed to be a jury commissioner for Macon County sometime after this suit was filed.

THE DEFENDANTS LIVINGSTON AND ROGERS:

The matter is therefore focused as to Livingston and Rogers. If, as they contend, their resignations were effective in all respects, they cannot now be sued in their capacity as registrars of Macon County, Alabama.[7]

If, however, as the plaintiff contends, they have the continuing obligations of their office as registrars of Macon County, Alabama, until their successors are appointed,[8] they are proper parties to this action.

The statute prescribing the terms of office for the registrars in Alabama, designated as § 22 of Title 17, 1940 Code of Alabama, as amended, is as follows:

> "§ 22. *Terms of office.*—The registrars so appointed under this article may be removed at the will of the oppointing board, or a majority of the members thereof, at any time, with or without cause, and without giving their reasons therefor; and if not so removed, the registrars may hold office for four years from the time of their appointment and until their successors are appointed."

The plaintiff reasons that the word "may" as used in this statute is to be construed to mean "shall" wherever the rights of the pubic or third persons depend upon the exercise of the power or performance of the duty to which it refers. Such a theory is not without supporting authority even in Alabama. See *Montgomery* v. *Henry*, 144 Ala. 629 (1905).[9]

However, the real question here is: What did the Legislature of Alabama intend? There are no cases directly in point. In making an effort to resolve this question it is significant to note that Alabama has a general statute relating to terms of office. This general statute, designated as Title 41, § 176, 1940 Code of Alabama, as amended, reads as follows:

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[7] This Court does not understand that Livingston and Rogers are sued in any capacity other than as members of the Board of Registrars; their appearance in this cause as "individuals" was unnecessary.

[8] No successors have yet been appointed.

[9] Also see *Wilson* v. *United States*, 135 F. 2d 1005; *Vason* v. *City of Augusta*, 28 Ga. 542, and *People* v. *Turnbull*, 184 Ill. App. 151.

"*Vacancies in state and county offices; how filled; term of office.* Vacancies in all state and county offices are filled by appointment of the governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified."

It can very readily be seen that § 176 of Title 41 is not applicable to the registrars because of that portion of § 176 that says "except as otherwise provided"; this is true since it is "otherwise provided" in § 22 of Title 17, supra. Thus, insofar as the term of office for registrars is concerned, § 22 of Title 17 is generally controlling.

This Court is of the opinion that had the Legislature of the State of Alabama intended for the registrars to remain obligated to serve until their successors were appointed and qualified they would not have used the permissive term "may" but would have used the imperative term "shall" as they did in the general statute, supra.

In *Badger, et al.* v. *U.S. Ex Rel. Bolles*, (1876), 93 U.S. 599, which case is heavily relied upon by the plaintiff, the Supreme Court had before it for interpretation a statute of the State of Illinois, the pertinent part of that statute being "they shall hold their offices until their successors shall be qualified." The question there before the court was whether or not certain officers, to-wit, a supervisor, town clerk, or justice of the peace, could resign their offices and thereby be relieved of their duties and responsibilities prior to the time their successor was appointed or chosen and was qualified. Mr. Justice Hunt, delivering the opinion of the Supreme Court of the United States in October, 1876, decided this question by stating:

"The resignations may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact; to-wit, the appointment of a successor, and his qualification."

The court went on to say:

"So, we think, where a person being in an office seeks to prevent the performance of its duties to a

> creditor of the town, by a hasty resignation, he must see that he resigns not only *de facto*, but *dejure;* that he resigns his office not only, but that a successor is appointed. An attempt to create a vacancy at a time when such action is fatal to the creditor will not be helped out by the aid of the courts."

Another case relied upon by the United States to sustain its position that Livingston and Rogers cannot resign until their successors have been appointed and qualified is the case of *United States* v. *Green, et al.*, (Cir. Ct. W. D. Missouri, 1892), 53 F. 769. The applicable law there was part of the Constitution of Missouri, reading as follows:

> "In the absence of any contrary provision, all officers hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."[10]

A similar point was also raised in *United States* v. *Justices of Lauderdale County*, (1882), 10 F. 460; this case involved a Tennessee statute which stated that "every officer shall hold his office until his successor is elected or appointed and qualified."

The rationale of the *Badger*, *Green*, and *Lauderdale* cases is that the acceptance by an individual of a public office and the awarding of this office upon an individual is "the imposition of a public trust by agreement between the state and the officeholder. Why may not the state attach as a condition to the bestowal of the honors and compensation growing out of the trust, that it shall not be surrendered until the state has designated a successor, so that the public interests shall not suffer?" That rationale appears to be good, consistent, and legally sound insofar as it relates to the Illinois, the Missouri, and the Tennessee statutes. However, it is not sound and it cannot be made

[10] It should also be noted that in the *Green* case the process sought to be enforced (mandamus) was made final before the officials attempted to resign. The court seemed to attach considerable significance to that fact, saying: "Their attempt to thus escape the judgment of this court was as abortive as it was ill advised."

applicable to the Alabama statute. To hold that Registrars Livingston and Rogers entered into an agreement with the State of Alabama, when they accepted the appointment of registrars of Macon County, to the effect that they "shall" or "must" or "would" continue in said office until their successors had been appointed and qualified would be to disregard completely the wording of the Alabama statute.

To so hold would be to disregard completely the intent of the Legislature of the State of Alabama, which intent is manifested by the wording of that statute.

To so hold would be to disregard completely § 160, Title 41 of the 1940 Code of Alabama, as amended,[11] 139 , which statute specifically recognizes and provides that such offices can be vacated "By . . . resignation, except in such cases as are excepted by law." There are no exceptions in the case of registrars. In this connection, see *Amy* v. *Watertown* (1888), 130 U.S. 301, 316, in which case the Supreme Court recognized that the statute law of Wisconsin providing for the procedure to be followed in cases of resignation "was decisive" and "preclude the operation of any such rule as was recognized in Badger v. Bolles . . ."

Under the Alabama law, Registrars Livingston and Rogers (as well as any other registrars that accept an appointment while § 22 of Title 17 is in effect) accepted their appointments and agreed to serve "at the will of the appointing board" and with the understanding that they could be removed at any time by a majority of the appointing board (the governor, auditor and commissioner of agriculture and industries) "with or without cause and without giving their reasons therefor." For this Court

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[11] "§ 160. *How offices are vacated.*—Any office in this state is vacated:

"By the death of the incumbent.

"By his resignation, except in such cases as are excepted by law.

"By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed.

"By the decision of a competent tribunal declaring his election or appointment void, or his office vacant.

"By the act of the legislature abridging his term of office, when the same is not fixed by the constitution.

"In such other cases as are or may be declared by law."

to follow the *Badger*, the *Green*, and the *Lauderdale* cases and to apply the rationale of those cases to this case would also mean that the registrar who accepted a position under a statute which said he "may hold office for four years" (subject to removal at the possible whim of the appointing board) could not for reasons of health or business, or other good and substantial reasons, in good faith terminate his office by resignation until the appointing authority decided to appoint his successor and until his successor got around to qualifying. This Court must and does now hold that the Legislature of the State of Alabama, in using the word "may" intended that the registrars not be required to hold office for four years from the time of their appointment, but that they "may" be removed with or without cause by the appointing board and that they "may" in good faith resign their office. Such an interpretation works no great hardship upon anyone. It does not permit any widespread conspiracy to defeat the law, it does not necessarily permit the paralyzation of governmental functions that are necessary to organized society, and it does not permit any "hiatus or interregnum," since the remedy of mandamus, if the circumstances warrant and justify its use, is always available to require the appointing board to fill, if they refuse to act within a reasonable time, any vacancies that may be created, such as these.

Nothing stated in this opinion should be construed to mean that this Court sanctions or will sanction the proposition (here unnecessarily advanced by Livingston and Rogers) that registrars are free to resign at will, indiscriminately and in bad faith, and thereby cast off all of their responsibilities and obligations as such officers.

THE DEFENDANT "THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA":

The next category of points raised by the motion to dismiss relates only to the defendant "The Board of Registrars of Macon County, Alabama." It is contended that this Court has no jurisdiction over the Board of Registrars as such, because, first, said Board is not in fact or in law a separate suable legal entity, and, second,

the Board is not a "person" within the meaning of that section of the Civil Rights Act authorizing preventive relief suits such as this one.[12]

Registration in Alabama is provided for in § 186 of the Alabama Constitution of 1901 and Title 17, § 21 of the 1940 Code of Alabama, as amended.[13] It is the individuals on the Board, and not the Board itself, that conduct the registration; it is the individuals on the Board who may by their "acts and practices" deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote. Therefore, it is the *individual* officers that preventive relief—herein the form of injunctions—must be obtained against."

In *Handy Cafe, Inc.* v. *Justices of the Superior Court, et al.*, (1st Cir., 1957), 248 F. 2d 485, cert. den. March 10, 1958, 356 U.S. 902, the plaintiff sued, under § 1983, Title 42, U.S.C.A.[14] (an old Civil Rights statute), "the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts." Plaintiff there claimed deprivation of certain constitutional rights by those defendants, under color of their respective offices and that it (the plaintiff) had been denied the equal protection of the laws, contrary to the Fourteenth Amendment. The plaintiff there sought declaratory relief and an injunction.

With reference to whether or not "the members of the Superior Court and Supreme Judicial Court" constituted a suable legal entity, the First Circuit Court of Appeals in a *per curiam* opinion[15] stated:

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[12] Sec. 1971(c), Title 42, U.S.C.A.

[13] The pertinent part of that Code section being set out in footnote 2.

[14] "Every person who, under color of any statute, ordinance, regulation or custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . ."

[15] Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges, sitting.

141 "In addition to the foregoing, we are bound to observe that we know of no authority to the effect that 'the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts' constitute suable legal entities. Action under the Civil Rights Act must be against the individual persons or officials who, under color of their respective state offices, subject a person to denial of federal constitutional rights. There are over thirty judges of the Massachusetts Superior Court throughout the Commonwealth and seven justices of the Supreme Judicial Court. Obviously not all of these persons could have been concerned with the various state court proceedings herein complained of. It does not appear against which individuals judgments for damages and enforcement orders are sought to be issued.

"All in all, we regard this as a completely preposterous case."

Also in point here is the case of *Hewitt* v. *City of Jacksonville*, (1951, 5th Cir.), 188 F. 2d 423, where the court, speaking through Judge Holmes, said:

"The lower court, in refusing to allow the amended complaint to be filed, held that the word 'persons' used in the Civil Rights statute, 8 U.S.C.A. § 43, *does not include a State* or its governmental subdivisions acting in their sovereign . . . capacity." (Emphasis added.)

"We are in accord with the views expressed by the lower court;"

See also the Fifth Circuit case of *Charlton* v. *City of Hialeah*, (1951), 188 F. 2d 421, which followed the *Hewitt* v. *Jacksonville* decision.

Even though these cases involved another Civil Rights statute, this Court is of the opinion that the reasoning and conclusions reached are sound and should be applied in this case to plaintiff's action against "The Board of Registrars of Macon County, Alabama."

THE DEFENDANT STATE OF ALABAMA:

The motion to dismiss filed by the State of Alabama contains some fifty-eight grounds. These grounds fall into five general categories. They are:

(1) Civil Rights Act of 1957 authorizes actions only against "individual persons" and not states.

(2) States have exclusive jurisdiction in the field of voting by reason of the Tenth and Eleventh Amendments to the Constitution of the United States.

(3) Supreme Court of the United States has original and exclusive jurisdiction in cases involving sovereign states.

(4) Civil Rights Act of 1957 (particularly Part IV) is unconstitutional.

(5) Even if this Court determines that it has jurisdiction and determines that the Act is constitutional, it should refrain from exercising jurisdiction in this case because of comity.

Category two is obviously without merit. Part of
142 what this Court said in the case of *In re: George C. Wallace, et al.*, —— F. Supp. —— decided January 9, 1959), is applicable in this case and is dispositive of these points:

> "The authority delegated to the Federal Government by the Fifteenth Amendment to the Constitution of the United States is undoubtedly the authority under which the Congress of the United States was acting when the Civil Rights Act of 1957 was passed. The provision in the Act providing for investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered to be an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin. That part of the Act is, therefore, by this Court considered 'appropriate legislation' within the meaning of Section 2 of the Fifteenth Amendment.
>
> "The sovereignty of the State of Alabama, or of any other of the states, must yield, therefore, to this

expression of the Congress of the United States, since this expression of Congress—by this Act—was passed in a proper exercise of a power specifically delegated to the Federal Government, and the Court cites *Ex Parte Siebold*, 100 U.S. 371. This is necessarily true even though the states possess concurrent legislative jurisdiction with respect to voting, since the Federal Government, and its law, is supreme in this area. The Court cites *Kohl* v. *United States*, 91 U.S. 367.

"The concept of the sovereignty of the states is embodied in the Tenth Amendment to the Constitution of the United States, this amendment providing that those powers are reserved to the states which have not been 'delegated to the United States by the Constitution, nor prohibited by it to the States.'

"Here we have involved the very powers which the Constitution of the United States says are not reserved to the states. See *United States* v. *Reese*, 92 U.S. 214; *United States* v. *Darby*, 312 U.S. 100; and *Fernandez* v. *Wiener*, 326 U.S. 340.

"The fact that the State of Alabama voting and registration records are involved in this case does not alter and legal principle at all. *In re*: *Cohen*, 62 F. 2d 249; *United States* v. *Ponder*, 238 F. 2d 825; *Endicott Johnson Corporation* v. *Perkins*, 317 U.S. 501.

"Thus, it must be generally concluded, and this Court now concludes, that since the Congress of the United States did have the authority to pass the Civil Rights Act of 1957 and that said authority is supreme in this field as opposed to any authority of the states, and since the Commission on Civil Rights was in issuing the subpoenas in question acting pursuant to that Act, and since this Court was in issuing its order upon the application of the Attorney General of the United States also acting pursuant to said Act, the contention that movants make that enforcement of the subpoenas will constitute and illegal invasion of the sovereignty of the State of Alabama and the contention that this Court is without jurisdiction to enforce compliance with said subpoenas are without merit and cannot stand."

As to defendant's contention that the Supreme Court has original jurisdiction, there is no question. See Article III, § 2 of the Constitution of the United States. Also *United States* v. *West Virginia*, 295 U.S. 463, 470, and *United States* v. *California*, 297 U.S. 175, 187. However, it is not true that this jurisdiction is exclusive. In the *California* case, supra, the Supreme Court held that venue properly lay in the district court in California in
143 an appropriate case. See also *New York* v. *United States*, 326 U.S. 572, and *Colorado* v. *United States*, 219 F. 2d 474. Here, there is in 42 U.S.C.A. § 1971(c) and (d), specific and unambiguous Congressional authorization for actions such as this one to be commenced in this Court.

Because of the conclusions hereinafter reached by this Court in connection with the State's motion and in keeping with the duty of any court to avoid constitutionl questions unless essential to a proper disposition of a case,[16] this Court will not, at this time, pass upon the question of the constitutionality of Part IV of the Civil Rights Act of 1957. It is also unnecessary to discuss in this opinion the objections of the State upon the ground of comity.

The category of objections remaining concern the question of whether or not the Civil Rights Act of 1957 authorizes actions for preventive relief by the Attorney General against states. Without any doubt, the Congress of the United States had the authority to grant such a right.[17] The question here is: Did it confer that authority in this Act? This Court is of the opinion that Congress did not intend for such actions against states to be authorized by this Act.

There is no doubt that such authority would be appropriate—and even in certain circumstances necessary—if Congress intended to give full and complete authority to the Attorney General of the United States to enforce the

[16] For two recent cases reiterating this proposition see: *Harmon* v. *Brucker*, (1958), 355 U.S. 579, 581, and *Byer* v. *Byers*, (CCA 5, 1958), 254 F. 2d 205, 208.

[17] See the reasoning of this Court on the authority of the Federal Government in the field of voting in the case of *In re: George C. Wallace, et al.*, supra.

constitutional rights here involved. This Court judicially knows that the Civil Rights Act of 1957 was a compromise measure and the compromise reflected an intention on the part of Congress to give limited authority—as opposed to full and complete authority—in this field. A reading of the legislative history of this Act impresses this Court with the fact that if it had then been mentioned that this Act authorized the United States to sue a state for preventive relief, the Act would not yet be passed.[18] As a matter of fact, it is very definitely inferred by the following statement of Attorney General Brownell that the Act was only to be used to obtain preventive relief against individual persons:[19]

144 "Mr. Brownell. It is my opinion that the bill before you from which you quoted does not increase the Department's jurisdiction in connection with State primary elections. At the present time, our jurisdiction is limited to commencing criminal proceedings under sections 241 and 242, which are the criminal provisions of the civil-rights laws. Under 242, it is necessary that the wrongdoer be a State officer. In other words, that he be acting under color of law. Under section 241, you have to prove a conspiracy. The statute operates only against conspirators, in other words."

The Court must presume, therefore, that Congress in using only the word "person" deliberately restricted the authority of the Attorney General to institute such actions. Such reasoning as now used and the conclusion as is now reached is analogous to the reasoning and conclusion of the Supreme Court of the United States in *United States* v. *Mine Workers*, (1947), 330 U.S. 258, 275. In that case, the court held, among other things, that the Norris-LaGuardia Act did not apply to the "Government in all cases" and observed:

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[18] In this connection, see the testimony and statements of Attorney General Brownell before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-fifth Congress, at pages 570, 589, 590, 591, 599, and 602.

[19] Ibid, page 606.

"The Act does not define 'person.' In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so . . . The absence of any comparable provision extending the term to *sovereign governments* implies that Congress did not desire the term to extend to *them.*" (Emphasis added.)

In accordance with the foregoing, an appropriate order will be entered dismissing this action as to each of the defendants.

Since the action is to be dismissed as to all defendants, the motion to produce, as to each of them and their objections thereto, and the motion to strike and quash service are moot.

Done, this the 6th day of March, 1959.

FRANK M. JOHNSON, JR.
United States District Judge

(File endorsement omitted)

145 IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Judgment of Dismissal—March 6, 1959

Upon consideration of the motions of the defendants, Grady Rogers, E. P. Livingston, The Board of Registrars of Macon County, Alabama, and the State of Alabama, each seeking to have this action dismissed as to each of them, separately and severally, and for the reasons set forth by this Court in a memorandum opinion made and filed in this cause on this date, it is the

ORDER, JUDGMENT and DECREE of this Court that said motions be and they are hereby granted. It is the further

ORDER, JUDGMENT and DECREE of this Court that this action be and it is hereby dismissed as to Grady Rogers, E. P. Livingston, The Board of Registrars of Macon

County, Alabama, and the State of Alabama. It is the further

ORDER, JUDGMENT and DECREE of this Court that the cost of this proceeding be and it is hereby taxed against the United States.

Done, this the 6th day of March, 1959.

FRANK M. JOHNSON, JR.
United States District Judge

(File endorsement omitted)

146 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Motion for Stay—Filed March 6, 1959

Comes now the United States of America, by its attorneys and moves this Honorable Court for an Order staying the judgment herein entered on the 6th day of March, 1959, and for reasons therefor states as follows:

1. The judgment entered in this case pertains to issues involving substantial questions of law.

2. In order to preserve all rights of appeal which plaintiff, United States of America, may possess herein, it is necessary that the effectiveness of this Court's above-mentioned judgment be stayed to and including the 16th day of March, 1959, in accordance with the terms of the temporary restraining order entered in this case by the Court on March 5, 1959.

3. Unless the judgment entered herein is so stayed, irreparable injury can be done to the plaintiff herein, whereas, entry of an order staying that judgment can occasion no possible harm to defendants.

Respectfully submitted,

W. WILSON WHITE
W. Wilson White
Assistant Attorney General

Order Staying Judgment—March 6, 1959

This matter having come on on motion of the attorneys for the plaintiff, the United States of America, to stay the effectiveness of the judgment entered herein on 6th day of March, 1959, and it appearing to the Court for good cause shown that the effectiveness of said judgment should be stayed,

It is hereby ORDERED, ADJUDGED, and DECREED that the effectiveness of the judgment entered herein on the
147 6th day of March, 1959, be and here is stayed until and including March 16, 1959, and

It is further ORDERED that the temporary restraining order issued herein on March 5, 1959, be and hereby is continued in full force and effect until March 16, 1959.

It is further ORDERED that a certified copy of the foregoing motion and of this Order be served by the United States Marshal on Honorable McDonald Gallion, Attorney General of the State of Alabama, as attorney for the State of Alabama.

DONE this 6th day of March, 1959.

FRANK M. JOHNSON, JR.
Frank M. Johnson, Jr.,
United States District Judge

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148 **Marshal's Return on Service of Writ**

(Omitted in printing)

(File-endorsement omitted)

149 **Order Extending the Temporary Restraining Order—March 5, 1959**

(Omittted. Printed side page ~~132~~ 78 supra)

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150 **Marshal's Return on Service of Writ**

(Omitted in printing)

(File endorsement omitted).

151 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

(Title omitted)

Plaintiff's Motion and Order Directing the Clerk to Deliver the Original Record to Judge Richard T. Rives—March 6, 1959

Comes now the United States of America by its attorney, Hartwell Davis, and moves this Honorable Court for an order directing the Clerk of this Court to deliver the original record in this cause to Honorable Richard T. Rives, Judge, United States Court of Appeals for the Fifth Circuit on the 6th day of March, 1959, and as grounds therefor states as follows:

1. The United States wishes to appear before the United States Court of Appeals for the Fifth Circuit at the United States Post Office and Court House in Jacksonville, Florida at 2:30 P. M., on March 11, 1959, to present certain motions and request certain relief from said Court.

2. That it is agreeable with Judge Rives to carry the original record with him to Jacksonville in order that the Court may be fully informed.

Respectfully submitted

HARTWELL DAVIS
Hartwell Davis
United States Attorney

Order

The foregoing motion having been considered by the Court and the Court being of the opinion that same should be granted,

It is hereby ORDERED that the Clerk of this Court shall deliver to Judge Richard T. Rives the entire original record in this matter in order that the United States Court of Appeals may have same before it for its use in considera-

tion of any motions, petitions, and arguments which shall be made by the parties to this cause.

Done this March 6th, 1959.

FRANK M. JOHNSON, JR.
Frank M. Johnson, Jr.,
United States District Judge

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152 CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

153 IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

(Title omitted)

Notice of Appeal—Filed March 9, 1959

Notice is hereby given that the United States of America, plaintiff above-named, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit, from the judgment entered in this action on March 6, 1959.

W. WILSON WHITE
W. Wilson White
Assistant Attorney General

CERTIFICATE OF SERVICE

(Omitted in printing)

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154 (Clerk's Certificate to foregoing transcript omitted in printing)

(File endorsement omitted)

155 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,684

UNITED STATES OF AMERICA, *Appellant*,

versus

STATE OF ALABAMA, ET AL., *Appellees*.

Denial of Motion for Injunction Pending Appeal—March 11, 1959

Before RIVES and TUTTLE, Circuit Judges and SIMPSON, District Judge.

BY THE COURT:—

Upon the following assurance from the Attorney General of Alabama:

"The State of Alabama has itself subpoenaed these records through the Circuit Solicitor of Macon County, Alabama for use before the Grand Jury of that county. He now has custody and physical possession of the records. The State of Alabam itself is therefore interested in these particular records and their preservation, and the records are under the control of the legal department of the State of Alabama under this subpoena.

I, Mac Donald Gallion, as the Attorney General of the State of Alabama and the chief legal officer of said State, can and do assure this Court that these records will not be destroyed pending the final disposition of this cause should the Motion of the United States Government for a Stay Order or Temporary Injunction now before the Court be denied."

The Motion for Injunction pending disposition of the appeal is denied without prejudice to the renewal of said Motion before this Court if the Appellant hereinafter so desires.

March 11, 1959.

ENTER RIVES, *Judge*.

(File endorsement omitted)

156 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title omitted)

Before RIVES and TUTTLE, Circuit Judges, and SIMPSON, District Judge.

Order Granting Motion to Advance Appeal—March 11, 1959

ON CONSIDERATION of the Motion of Appellant to advance this appeal for hearing, and of the opposition thereto,

IT IS ORDERED that such Motion be, and the same is hereby granted. Accordingly, this cause will be expedited for hearing at New Orleans, Louisiana on April 27, 1959, upon the original typewritten transcript of record, as numbered, indexed and certified by the Clerk of the District Court, with four (4) legible copies of the brief for Appellant to be filed in typewritten form on or before March 25th, and the brief for Appellee to be filed in like form on or before April 22, 1959.

ENTER:

March 11, 1959.

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157 **Minute Entry of Argument and Submission—May 1, 1959**

(Omitted in printing)

158 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17684

UNITED STATES OF AMERICA, *Appellant*,

versus

STATE OF ALABAMA, ET AL., *Appellees*.

Appeal from the United States District Court for the Middle District of Alabama

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

Opinion—June 16, 1959

HUTCHESON, Chief Judge: This appeal tests for error the order of the district judge dismissing the complaint as to all the defendants for the reason stated in his opinion[1] as to each.

159 This is the record. On February 5, 1959, the United States of America, appellant filed an action against appellees Grady Rogers, E. P. Livingston, and the Registration Board of Macon County, Alabama. This action was brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S. Code, sec. 1971)[2] to obtain preventive relief against certain act and practices which deprive citizens of their right to vote on account of race or color.

The complaint specifically alleged the following facts. The appellees, the Registration Board and Rogers and Livingston, sued as members, who, under Alabama law are responsible for registering qualified citizens for voting,

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[1] United States of America v. State of Alabama, et al., 171 F. Supp. 720.

[2] Sec. 1971(c). "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsec. (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

have engaged in certain discriminatory acts and practices. Among those practices are the maintenance of separate and segregated registration facilities for negroes; the application of more stringent and more rigid registration standards to negroes than to whites; and various other acts and practices which clearly set forth denial of registration to vote solely on account of race or color. Such discriminatory acts and practices have brought about and perpetuated a great disparity between the respective percentages of white and negro citizens of voting age registered to vote in Macon County, Alabama, despite the fact that negro citizens of voting age in Macon County greatly outnumber white citizens of voting age.[3]

Appellees Rogers and Livingston, who are not before the court as individuals but only as members of the Board of Registration, resigned as registrars of Macon County in Dec., 1958, some two months before this suit was filed. Their resignations were absolute and unconditional, and it was shown by affidavits, depositions and documents, that neither intended to serve again as a member of the Board of Registration, that their resignations had been accepted by the appointing board, and that each had accepted and qualified for another public office. The Registration Board, for the purpose of preventing negroes from registering, became inoperative during long periods of time from 1946 to present. The latest paralysis of that office occurred in December 1958 and was caused by the purported resignation of its only two members.

An injunction was sought to prevent the above named appellees from engaging in the alleged acts, practices, methods or procedures in whatever form, which discriminate against any applicant for registration for voting in Macon County, Alabama, on account of his race or color.

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[3] In 1958 white citizens of voting age numbered approximately 3100, whereas negro citizens of voting age numbered approximately 14,000. As of Dec. 1, 1958, white citizens registered to vote in Macon County numbered approximately 3,016, or approximately 97% of the white population of voting age; and the negro citizens registered to vote in Macon County numbered approximately 1100, or approximately 8% of the negro population of voting age. (Complaint, par. 8, 9, R. 3)

Subsequently on February 23, 1959, appellant amended the original complaint to include as a party defendant the State of Alabama. This amendment averred that the State of Alabama, through its agents, officials and agencies, had engaged in the discriminatory and unlawful practices specified in the complaint. The amendment sought a declaratory judgment of the illegality of these acts and practices and a judgment "enjoining Defendant State of Alabama from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the United States and the decree of this Court".

Appellees filed motions to dismiss.[4] Essentially, appellee State of Alabama objected to the action on the ground that the Civil Rights Act of 1957 does not authorize suits against states but only individual "persons" and that the State is not a "person" within the meaning of the A..; that states have exclusive jurisdiction in the field of voting by virtue of the Tenth and Eleventh Amendments to the United States Constitution; that in any event the District Court has no jurisdiction over actions involving a state; and that the Civil Rights Act of 1957 is unconstitutional. Appellees Rogers, Livingston, and the Registration Board objected to the complaint on the ground that the suit was improperly brought against Rogers and Livingston because they had effectively resigned their office as registrars; that the Civil Rights Act of 1957 does not authorize suits against the Registration Board but only against individual persons; that the State of Alabama is an indispensable party; that the action is precluded by the Eleventh Amendment to the Constitution; and that the registration board was not a suable entity under the laws of the State of Alabama.

The court below dismissed the complaint as to all defendants. With respect to appellees Rogers and Livingston, it held that they could not be made defendants because their

[4] In addition to the motions to dismiss appellees filed several other motions including a motion to strike and quash service, an answer or objection to the motion to produce, and a motion to dissolve the temporary restraining order. The issues on these subsidiary motions were essentially the same as on the motions to dismiss.

resignations were effective in all respects, and that, under the applicable Alabama law registrars have no obligation to continue to serve until successors were appointed to fill that office. The court dismissed as to the Registration Board on the grounds that it was not a suable legal entity under Alabama law and that in any event the Civil Rights Act of 1957 does not authorize suit against such a board, but permits a suit only against individual persons as members of the Board.

The court held that the action would not lie against the State of Alabama, on the ground that the Civil Rights Act of 1957 did not authorize a suit against a state. Having held, for the reasons stated as to each, that none of the defendants were subject to the suit, the court entered a judgment dismissing it as to each.

163 Appealing therefrom, plaintiff-appellant is here urging against the judgment three specifications of error:

> 1. The District Court erred in holding that 42 U.S.C. 1971(c) does not permit the Attorney General to bring an action against the State of Alabama or the Board of Registrars of Macon County, Alabama.
>
> 2. The District Court erred in holding that an action under the Civil Rights Act of 1957 will not lie against registrars who have purported to resign their office, but for whom no successors have been appointed.
>
> 3. The District Court erred in holding that the Board of Registrars of Macon County, Alabama, is not a suable legal entity.

and seeking its reversal.

Paramounting the first specification, that the court erred in holding that the statute upon which the suit was based does not permit the Attorney General to bring an action against the State of Alabama, appellant devotes the major portion of its brief to a discussion and argument which, not confining itself to an interpretation and construction of the statute, but, taking far wider range, undertakes to discuss not the actualities of the jurisdiction claimed to have been conferred by the statute but the possibilities in general

of conferring upon the federal courts jurisdiction of an action against a state of the kind asserted here.

164 Interesting and engaging as these speculations are, we will not indulge in them here, but, confining ourselves to the sole question for determination, whether the statute supports the jurisdiction asserted, we will state simply but categorically, that we agree with the district judge that neither on its face nor in its history, taken alone or in connection with civil rights legislation in general, is there any reasonable basis for holding that, in providing "whenever any person, * * *", the congress intended to, or did, provide for suit against a sovereign state.

Without elaborating upon it, as under the settled law of the cases we could do in extenso, it is sufficient for us to simply say that, under the principle which has been, and still is, controlling upon the federal courts, whatever congress might or could do in providing in a civil rights action for conferring federal court jurisdiction over a state, it has never heretofore done so and it has not in terms done so in the statute invoked here.

Absent such specific conferring of jurisdiction, a federal court would not, indeed could not assume jurisdiction over a sovereign state without a precedent determination that, though the jurisdiction had not been expressly conferred, the language of the invoked statute carried the necessary, the unavoidable implication that the congress upon the gravest considerations and after the utmost thought and deliberation had intended to and did confer it.

165 Reading the statute as one will, such an implication cannot be found in it. For it cannot be reasonably contended: that the congress intended in a situation of this kind, where both the complaint and the Alabama statutes themselves, of which we take judicial knowledge, plainly show, that no exception or objection is, or can be, made on any kind of constitutional grounds to the will of the state there expressed to confer or that there is any need for or justice in finding authority, under this statute to sue the state itself for the wrongs upon the statute and upon it perpetrated by its allegedly unfaithful servants. Indeed, the gravamen of the complaint against the officers of the state who subvert and pervert the state's will,

166 as expressed in its statutes,* is that defendants Rogers and Livingston, "in the course of their official duties have discriminated against qualified negro citizens on account of their race or color, and a judgment is sought declaring such past acts and practices to be illegal under the constitution and laws of the United States. Further an order is sought enjoining said defendants so long as they remain responsible for the duties of their office and their successors when appointed and qualified from engaging in such illegal acts and practices in the future."

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* In Constantin v. Smith, a suit against the governor of the State of Texas, 57 F(2) 227, affirmed in Sterling, Governor of Texas v. Constantin, 287 U.S. 378, the court thus clearly and correctly stated the principles controlling in civil rights suits such as this one:

"Upon the first proposition advanced, that this is a suit against the state, and that as such it may not be maintained the authorities overwhelm; that this is a suit under the first subdivision of Sec. 41, 28 U.S.C.A., Sec. 24, Subd. 1 of the Judicial Code, to redress the deprivation of property arising under the Constitution and laws of the United States (Holt v. Indiana Mfg. Co., 176 U.S. 70). As such it is not a suit against the state, but against persons in their individual capacities, to prevent them from enforcing statutes in themselves unconstitutional, or unconstitutional as attempted to be enforced and applied. In such a suit, when it is found, that 'an individual, acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to import to him any immunity from responsibility to the supreme authority of the United States.' Ex parte Ayers, 123 U.S. 507; Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362; Ex parte Young, 209 U.S. 123; Yick Wo v. Hopkins, 118 U.S. 356; Truax v. Raich, 239 U.S. 33; Greene v. Louisville & Int. R.R., 244 U.S. 507; McMilan v. Comm., 51 F(2) 400; McLeaish v. Binford, 52 F(2) 151. In this suit plaintiffs invoke the exercise of the judicial power of the United States which, vested by the Constitution in its courts, extends to all cases of law and equity arising thereunder. * * * *"

"No exertion of this power rests on clearer or more certain grounds than that of its chancery jurisdiction. * * * *"

"Of the chancery jurisdiction no phase of it has a better settled basis, a more comprehensive and remedial scope than that which it employs to prevent persons, acting under the authority or color of state laws, from denying the due process and equal protection which the Fourteenth Amendment guarantees. This must necessarily be so; for, independent of each other in their respective spheres as are the state and federal governments, the Constitution of the United States is the supreme law of the land, and the courts of the United States, as the repositories of federal power, are compelled to and will assert and vindicate its supremacy, to protect the rights of individuals menaced by personal aggression masked under official power. * * * *"

We thus come to the second specification of error that, though, as the district judge expressly found, the two, sued as board members, had, some two months before the suit was brought, in good faith resigned their offices and each has taken another state office, they can and should be treated as still members of the board, to say of it that we think the short and simple answer to it is that the supposed need for some one to sue cannot be made, as appellant seeks to make it, to serve as a valid reason for re-
167 jecting out of hand the general principle, which underlies and conditions, existence and exercise of jurisdiction over a person sued in a particular capacity, that such person has that capacity.

In addition to pointing out, as the district judge did, that the remedy does not lie in perverting jurisdictional processes by means and to ends as injudicious as they are unjudicial, by holding one who is not an officer responsible as such, but that it lies in taking appropriate action under Alabama law to compel those authorized to, and responsible for, constituting and filling vacancies in the membership of the Board of Registrars to fill those offices, it is sufficient to say that these considerations aside, we are of the clear opinion that the reaons given by the district judge for rejecting this contention of plaintiff-appellant are sound, indeed unanswerable, and that we approve and adopt them.

Of the third and final specification, that the Board of Registrars, without members to be sued or served, constituted a legal entity which must stand in judgment in this suit, we think we need do no more than say that no sound argument is presented or authorities cited against the decision reached and the judgment entered by the district judge. Indeed, no argument is presented in support of the action which the court below was asked, but refused, to take, that is to assume jurisdiction over a board without members, a jurisdiction which, for lack of process it did not and could not assert, except the same argument of Necessity or
168 Desirability made in connection with the second specification. Putting to one side: that such an argument may not serve other than as a cautionary warning against too readily accepting an apparently wrong result as a right one; that it can never take the place of, or serve as real grounds for asserting, jurisdiction, to point out, as

the district judge did, that the remedy lies not in trying to sue a memberless board but in a suit against the appointing officers of the state to require the appointment of members to the board, we think it beyond any doubt that there is no basis for the claim that, in ruling as he did, for the reasons that he gave, the district judge in any way erred.

Stating: "It is the individuals on the Board and not the Board itself that conduct the registration; it is the individuals on the Board who may by their 'acts and practices' deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote, therefore, it is for the individual officers that preventive relief—here in the form of injunctions—must be obtained against.", the district judge, citing *Handy Cafe, Ins.* v. *Justices*, 248 F(2) 485; *Hewitt* v. *City of Jackson*, 188 F(2) 423; and *Charleston* v. *City of Hialiah*, 188 F(2) 421, to which may be added *McSwan* v. *County Board*, 104 F. Supp. 861, *Gerald Graves* v. *City of Bolivar*, 154 F. Supp. 625, correctly we think, appraised the legal situation arising on the facts and correctly denied the
169 relief asked. In reaching this conclusion we have not overlooked or disregarded *Garner* v. *McCall* (Ala.), 178 So. 210 and *Boswell* v. *Bethea* (Ala.) 5 So. (2) 816, cited by the appellant as requiring a contrary ruling. We think appellant's reliance on them will not at all do. Indeed, we think that the Boswell case which dealt with an appeal from a judgment of the Circuit Court in a suit against the Board of Registrars, composed of the three members, naming them, explicitly confirms the position of the district judge that, suing a board having no members is as inconceivable in law as suing, as members of a board, persons who are not such, and that under the facts established and found, the judgment mut be affirmed.

AFFIRMED.

170 IN UNITED STATES COURT OF APPEALS

No. 17684

UNITED STATES OF AMERICA,

versus

STATE OF ALABAMA, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by Counsel:

Judgment—June 16, 1959

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, Affirmed.

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171 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,684

UNITED STATES OF AMERICA, *Appellant*,

versus

STATE OF ALABAMA, ET AL, *Appellees*.

Appeal from the United States District Court for the Middle District of Alabama

Order Transmitting Original Papers to the Supreme Court of the United States—Filed July 14, 1959

Pursuant to the request of counsel for appellant, to transmit to the Supreme Court of the United States the original papers that were before this Court in the above entitled and numbered cause for use in said Supreme Court in connection with the petition for certiorari.

IT IS ORDERED that the Clerk of this Court be, and he is hereby authorized to transmit to the Clerk of the Supreme Court of the United States, the original papers that were

filed in this Court as the transcript of record in the case, for use in connection with appellant's petition for writ of certiorari, said original papers to be returned upon final disposition of the case by the Supreme Court.

/s/ J. C. HUTCHESON, JR.
Chief Judge, U. S. Court of Appeals

July 14, 1959.

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172 Clerk's Certificate to foregoing transcript omitted in printing

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173 SUPREME COURT OF THE UNITED STATES

No. 398, October Term, 1959

(Title omitted)

Order Allowing Certiorari—November 16, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960—536626/P.O. 918

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALABAMA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-captioned case.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama (Appendix A, *infra*, pp. 12–30) is reported at 171 F. Supp. 720. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 31–41) is reported at 267 F. 2d 808.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 41) was entered on June 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

had perpetuated a great disparity between the respective percentages of white and Negro citizens of voting age registered to vote in Macon County, Alabama, in favor of the former, despite the fact that Negro citizens of voting age in Macon County greatly outnumber white citizens of voting age (R. 3). The complaint sought a declaratory judgment of the illegality of the specified acts and practices and an injunction to prevent future discrimination (R. 7–8).

On February 23, 1959, the complaint was amended to include the State of Alabama as a party defendant. It was alleged that the State, through its agents, officials and agencies, had engaged in discriminatory and unlawful practices restricting the right of Negroes to register and to vote. The amendment sought a judgment declaring that these acts and practices were illegal and "enjoining Defendant State of Alabama from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the United States and the decree of this Court" (R. 70–71).

Motions to dismiss were filed (R. 65–68, 120–130), and granted as to all defendants (R. 139). The District Court held that the action did not lie against the State of Alabama because the Civil Rights Act of 1957 did not authorize suits against States as such (App. A, *infra*, pp. 28–29). It held further that the individuals sued, Rogers and Livingston, could not be made defendants because they had resigned prior to the institution of the action (App. A, *infra*, pp. 16–22), and that the Board of Registrars was neither a suable

entity under Alabama law nor a "person" subject to suit within the meaning of the Civil Rights Act (App. A, *infra*, pp. 22–25). The Court of Appeals affirmed (App. B, *infra*, pp. 31–41).

REASONS FOR GRANTING THE WRIT

The principal question presented for review is whether, assuming that (1) the individual Board members who were sued had effectively resigned prior to institution of this action and (2) the Board of Registrars is not a legal or suable entity, the Civil Rights Act of 1957 authorizes, in such circumstances, the grant of injunctive relief against a State.[2] This question is one of first impression.[3] As is apparent, it is also a

[2] This Court has frequently held that, save in exceptional circumstances, it will not review questions of state law which have been determined by the lower federal courts in the area. See, *e.g.*, *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 529–30; *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530, 534; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237. The District Court and the Court of Appeals have here held, without relying on any precise holdings by the Supreme Court of Alabama, that under the applicable Alabama statutes (1) the individual Board members had effectively resigned and (2) the Board is not a suable entity. In view of the general rule of review declared by this Court in the cases cited, the Government will assume *arguendo*, for purposes of this petition, the correctness of these rulings as to state law, unless the Court should deem that there here exist exceptional circumstances warranting review of those issues. We wish specifically to reserve, however, the right to argue, in the event that certiorari is granted, that the registrars, despite their "resignations", remained under a *federal* duty to redress, so far as within their power, the discriminations against federal constitutional rights for which they were responsible.

[3] It is, of course, clear that a State has no general immunity from suit by the United States. *United States* v. *Texas*, 143 U.S. 621; *United States* v. *California*, 332 U.S. 19.

question of vital and fundamental importance to the future administration of the Civil Rights Act. Indeed, this case dramatically illustrates the proposition that, if a State is not amenable to the Act, the statutory objectives may be thwarted. Thus, as soon as there is an inkling that a federal investigation is afoot, registrars may resign. (The individual defendants sued in this case, Rogers and Livingston, resigned following institution of an investigation of their acts and practices by the Commission on Civil Rights (App. A, *infra*, pp. 15–16).)[4] Other state officials may leave the vacancies unfilled for indefinite periods. (The vacancies in Macon County have not been filled since the resignation of Rogers and Livingston, and the Board has now been inoperative for some nine months.)

On the other hand, if the State may be sued there can be no doubt that equity has ample and appropriate powers to require the State (if necessary, through its highest officials, as well as its local officers) to take affirmative steps to remove those discriminations which have been imposed in the past and to give effect to the right to vote—a right which the State itself is forbidden by the Constitution of the United States to deny or abridge.[5]

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[4] The technique of resignation by Board members has been used to thwart registration by Negroes as well as to frustrate federal investigation or action. See complaint, para. 12, R. 4. And see Report of the United States Commission on Civil Rights, 1959, pp. 75–76.

[5] As to equity's capacity to require appropriate affirmative measures, see *Brown* v. *Board of Education*, 349 U.S 294, 300; *Terry* v. *Adams*, 345 U.S. 461, 470.

In our view, the courts below have incorrectly decided the important issue of the State's amenability to suit. We point out, *first,* that the statutory language does not preclude a suit against the State and that the question whether such an action is authorized must accordingly be answered by reference to the purposes and history which animate the legislation. We urge, *secondly,* that a study of the background and environment of the Civil Rights Act convincingly demonstrates that it was designed to give full implementation to the command of the Fifteenth Amendment—a command addressed to the States—and (in the words of the relevant House Report)[6] to "preserve this fundamental and basic right [to vote] *against any and all unlawful interference*" (emphasis added). Equity, we submit, is not powerless to grant in this ca[se] the only kind of relief which could be effective here—relief against the State itself—and to terminate by that avenue the long-standing denial of the constitutional rights of Negro citizens.[7]

(1) The Civil Rights Act (*supra,* pp. 2–3) authorizes the Attorney General of the United States to institute "a civil action or other proper proceeding for preventive relief" whenever "any person has engaged or there are reasonable grounds to believe that any person is about to engage" in certain acts or practices. The courts below were of the view that, since the statute comes into play when designated

[6] H. Rep. No. 291, 85th Cong., 1st Sess., p. 13.

[7] The fact that Negro citizens of Macon County have been persistently denied the right to vote for many years must be taken as established in the present posture of this litigation.

acts or practices are committed by "persons", an injunction may not issue against a State. The statute, however, does not impose any such limitation upon the grant of relief. It does not specify that preventive relief shall be directed only to natural persons or to any other designated class, and we submit that the remedial provisions should be liberally, rather than restrictively, interpreted to the end that relief shall be adequate to the needs of the case.

Even if the tatutory reference to action or threatened action by "any person" were read into the provision authorizing preventive relief, it would be an open question whether the term "person" should be taken to include a State. As this Court stated only last term, "[w]hether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment";[8] political bodies will be deemed within its coverage if "this result would best effectuate congressional policies * * *".[9]

(2) The relevant history begins with the Fifteenth Amendment which prohibits infringement of the right to vote "by the United States or by any State" (Section 1) and delegates to Congress to "power to enforce this article by appropriate legislation" (Section 2). We deal here with a provision of the Constitution which secures individual rights against *state action*[10] and with implementing legislation which un-

[8] *Sims* v. *United States*, 359 U.S. 108, 112.

[9] *Plumbers' Union* v. *Door County*, 359 U.S. 354, 358.

[10] See *James* v. *Bowman*, 190 U.S. 127; *Terry* v. *Adams*, 345 U.S. 461.

dertakes to afford those rights additional protection by providing for suit by the Attorney General of the United States as well as by private individuals.[11] It would be anomalous if such legislation were to founder because it does not in terms speak of suit against a State.

Far from justifying such a result, the history of the struggle over civil rights legislation in the 85th Congress leads one fairly to the conclusion that, so far as the right to vote was concerned, Congress undertook to provide the most comprehensive protection. Without undertaking an elaborate discussion at this stage, we advert briefly to the following significant items:

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[11] The authority for the institution of private actions, which derives from the Act of April 20, 1871 (17 Stat. 13), is found in 42 U.S.C. 1983, which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The court below, presumably referring to this Section, observed (App. B, *infra*, p. 36) that "civil rights legislation in general" does not authorize the grant of relief against a State. But this argument not only overlooks the difference in language between 42 U.S.C. 1983 and the provision here under review (which imposes no qualification as to the objects of preventive relief); it also ignores the crucial consideration that statutes authorizing private actions could not be interpreted, in view of the bar imposed by the Eleventh Amendment, as authorizing suits against a State.

Former Attorney General Brownell, speaking as the representative of the Executive, described the provisions in question "as machinery to enforce whatever the constitutional authority of the Federal Government may be in this area" (Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., p. 25).

The position of the Congress is summed up in the pertinent House Report (H. Rep. No. 291, 85th Cong., 1st Sess., pp. 12–13) as follows:

> The right of franchise must be protected by the sovereign if representative government is to be maintained. Therefore, the sovereign, acting within its constitutional jurisdiction, must preserve this fundamental and basic right against any and all unlawful interference. That the proposal of this section does that very thing is clear.[12]

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[12] Opponents of the legislation also understood that the proposal was a broad one which would comprehend actions against a State. Thus, Attorney General Patterson of Mississippi characterized the bill as giving the Attorney General of the United States the authority to secure "an injunction against the people of the whole State." He also observed that "such broad and sweeping authority conferred upon the Department of Justice * * * can be exercised and brought to bear upon the States of New York and California as well as upon the people of Mississippi and Georgia." See Hearings of Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess., p. 753. See also statement of Honorable Robert E. Jones of Alabama, *id.* at 796. Mr. Davis Grant, Assistant Attorney General of Texas, commented: "Thus you could have the State pitted against the Federal Government. This would most certainly result in a sharper conflict than an action against a private individual ever would." Hearings of the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the United States Senate, 85th Cong., 1st Sess., p. 448.

CONCLUSION

The District Judge who decided this case fully recognized that there are circumstances in which suit against a State is not only "appropriate" but "necessary" if the Attorney General is to have "full and complete authority * * * to enforce the constitutional rights here involved" (App. A, *infra*, p. 28). Whether Congress has conferred such authority by its enactment of the Civil Rights Act of 1957 is a question of national importance which should be resolved by decision of this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.
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SEPTEMBER 1959.

APPENDIX A

In the District Court of the United States for the Middle District of Alabama, Eastern Division

Civil Action No. 479–E

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALABAMA; THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA; GRADY ROGERS, E. P. LIVINGSTON, REGISTRARS, DEFENDANTS

MEMORANDUM OPINION

This is an action by the United States, as plaintiff, against Grady Rogers and E. P. Livingston—each as a member of the Board of Registrars of Macon County, Alabama—The Board of Registrars of Macon County, Alabama, and the State of Alabama, as defendants.

The action is brought under Part IV of the Civil Rights Act of 1957 (P.L. 85–315, 42 U.S.C.A. 1971 (c)) [1] to obtain preventive relief against acts and prac-

[1] § 1971(c): "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

tices by the named defendants which deprive other persons of rights and privileges secured by § 1971(a) of Title 42, U.S.C.A., namely, the right and privilege of citizens of the United States, who are otherwise qualified by law to vote at any election by the people in the State of Alabama, to be entitled and allowed to vote at all such elections without distinction of race or color.

The plaintiff says that each of the named defendants, being under a constitutional obligation to fulfill certain duties and obligations relative to registering qualified applicants of Macon County, Alabama, to vote without regard to considerations of race or color, has for many years, persisted in acts and practices in violation of this constitutional obligation, which acts and practices have resulted in depriving qualified citizens of their right to vote solely because of their race and color.

Originally the action did not include the State of Alabama as a defendant. However, the action was, pursuant to the provisions of Rule 15 of the Federal Rules of Civil Procedure, amended on February 23, 1959, to add as an additional party defendant the State of Alabama.

Plaintiff details the "acts and practices" the defendants are alleged to engage in violation of their constitutional obligations and seeks to have this Court adjudge those acts and practices to be in violation of the constitution and laws of the United States and to declare that said defendants are under a legal duty not to engage in, or permit its agents, officials and agencies to engage in such practices. Plaintiff also seeks to have this Court permanently enjoin the named defendants, or any of the defendants' agents, officials, and/or agencies from engaging in said acts and practices.

On February 12, 1959, the plaintiff, by appropriate

motion and supporting documents, moved this Court for an order directing the defendants to produce and permit the inspection, copying, and photographing of certain records, documents, and papers. This Court, upon proper application, issued on February 12, 1959, a temporary restraining order pending disposition of said motion to produce, restraining the defendants and/or their agents from destroying or otherwise rendering unavailable certain voting and registration records and other enumerated documents made and received by the Macon County, Alabama, Board of Registrars since January 1, 1954. The motion to produce, the order that was entered upon the motion to produce, and the temporary restraining order were amended on February 23, 1959, to include defendant State of Alabama.

The defendants Rogers, Livingston, and The Board of Registrars of Macon County, Alabama, separately and severally (1) move to dismiss the action as to each of them (amended February 23, 1959); (2) move to "strike and quash" the service upon each of them of the various papers in this cause; (3) object to plaintiff's motion to produce; and (4) move to dissolve as to each of them the temporary restraining order issued by this Court on February 12, 1959. The defendant State of Alabama also moves to dismiss the action as to it.

All of said defendants' motions and objections are now submitted to the Court upon the pleadings, certain affidavits and documents attached thereto, evidence by deposition, written briefs of all parties, and oral arguments of counsel.

Considering first the defendants Rogers, Livingston, and The Board of Registrars' amended motion to dismiss, with the supporting affidavits of the defendants Rogers and Livingston, it appears that said motion

cites some sixteen grounds in support thereof. The grounds fall into four general categories. They are: (1) The State of Alabama is an indispensable party; (2) the action is precluded by the Eleventh Amendment to the Constitution of the United States; (3) no relief can be had against defendants Rogers and Livingston because they had resigned; and (4) the Civil Rights Act of 1957 authorizes suits only against individual persons.

Because of the conclusions hereinafter reached by this Court, it will not be necessary in connection with the motions of Rogers, Livingston, and The Board of Registrars, to discuss or decide the questions involved in the first two categories.

Proceeding then to the third category of points (i.e., no preventive relief should be granted against Livingston and Rogers because they had resigned as registrars), the evidence presented—in the form of uncontroverted affidavits—shows that the members of the Board of Registrars of Macon County, Alabama, prior to December 10, 1958, were Grady Rogers and E. P. Livingston, the third member having died.[2] On December 10, 1958,[3] Livingston and Rogers each tendered to the appointing authority[4] a written resignation as a member of the Board of Registrars of Macon County, Alabama. Said resignations were submitted during a controversy between the Commission on Civil Rights and certain Alabama officials,

[2] In Alabama, registration of voters in each county is conducted by "a board of three reputable and suitable persons * * *" Title 17, § 21, 1940 Code of Alabama, as amended.

[3] Approximately two months before this case was filed.

[4] Appointing authority in Alabama is vested in the governor, auditor and commissioner of agriculture and industries, or by a majority of them acting as a board of appointment. See Title 17, § 21, 1940 Code of Alabama, as amended.

including Livingston and Rogers, over the right of said Commission to inspect and copy some of the same records the plaintiff in this case now seeks.[5] Both Rogers and Livingston now say that said resignations were absolute and unconditional; that they were made in good faith, and that neither intends to serve again as a member of the Board of Registrars; that said resignations have been accepted by the appointing board, and that each of them has qualified and begun serving in two other public offices.[6] Both Livingston and Rogers testify that all of the records now sought by the plaintiff were turned over to the sheriff of Macon County, Alabama, by them on December 8, 1958; that such action by them was in response to a *subpoena duces tecum* issued at the instance of Tom F. Young, Circuit Solicitor of the Fifth Judicial Circuit of Alabama. Solicitor Young testifies by deposition in this cause and the effect of his testimony is to substantiate that part of Livingston's and Rogers' testimony. Solicitor Young unequivocally states that he now has the custody of said records and that said records are in a locked room in the courthouse of Macon County, Alabama.

The Defendants Livingston and Rogers:

The matter is therefore focused as to Livingston and Rogers. If, as they contend, their resignations were effective in all respects, they cannot now be sued

[5] In Civil Action No. 1487-N, styled in re: George C. Wallace, et al., this court on January 5, 1959, ordered these same two defendants to make said records available; said order was complied with, and both Livingston and Rogers were dismissed from said action.

[6] Rogers was in May, 1958, nominated for and in November, 1958, elected to the Alabama House of Representatives; he was sworn in and commenced serving as such official in January, 1959. Livingston was appointed to be a jury commissioner for Macon County sometime after this suit was filed.

in their capacity as registrars of Macon County, Alabama.[7]

If, however, as the plaintiff contends, they have the continuing obligations of their office as registrars of Macon County, Alabama, until their successors are appointed,[8] they are proper parties to this action.

The statute prescribing the terms of office for the registrars in Alabama, designated as § 22 of Title 17, 1940 Code of Alabama, as amended, is as follows:

> § 22. *Terms of office.*—The registrars so appointed under this article may be removed at the will of the appointing board, or a majority of the members thereof, at any time, with or without cause, and without giving their reasons therefor; and if not so removed, the registrars may hold office for four years from the time of their appointment and until their successors are appointed.

The plaintiff reasons that the word "may" as used in this statute is to be construed to mean "shall" wherever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. Such a theory is not without supporting authority—even in Alabama. See *Montgomery* v. *Henry*, 144 Ala. 629 (1905).[9]

However, the real question here is: What did the Legislature of Alabama intend? There are no cases directly in point. In making an effort to resolve this question it is significant to note that Alabama has a

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[7] This Court does not understand that Livingston and Rogers are sued in any capacity other than as members of the Board of Registrars: their appearance in this cause as "individuals" was unnecessary.

[8] No successors have yet been appointed.

[9] Also see *Wilson* v. *United States*, 135 F. 2d 1005; *Vason* v. *City of Augusta*, 38 Ga. 542; and *People* v. *Turnbull*, 184 Ill. App. 151.

general statute relating to terms of office. This general statute, designated as Title 41, § 176, 1940 Code of Alabama, as amended, reads as follows:

> *Vacancies in State and County offices; how filled; term of office.*—Vacancies in all state and county offices are filled by appointment of the governor, except as otherwise provided; the appointees must be commissioned, and they shall hold their offices for the unexpired term, and until their successors are elected and qualified.

It can very readily be seen that § 176 of Title 41 is not applicable to the registrars because of that portion of § 176 that says "except as otherwise provided"; this is true since it is "otherwise provided" in § 22 of Title 17, supra. Thus, insofar as the term of office for registrars is concerned, § 22 of Title 17 is generally controlling.

This Court is of the opinion that had the Legislature of the State of Alabama intended for the registrars to remain obligated to serve until their successors were appointed and qualified they would not have used the permissive term "may" but would have used the imperative term "shall" as they did in the general statute, supra.

In *Badger, et al.* v. *U.S. Ex Rel Bolles,* (1876), 93 U.S. 599, which case is heavily relied upon by the plaintiff, the Supreme Court had before it for interpretation a statute of the State of Illinois, the pertinent part of that statute being "they shall hold their offices until their successors shall be qualified." The question there before the court was whether or not certain officers, to-wit, a supervisor, town clerk, or justice of the peace, could resign their offices and thereby be relieved of their duties and responsibilities prior to the time their successor was appointed or chosen and was qualified. Mr. Justice Hunt, deliver-

A similar point was also raised in *United States* v. *Justices of Lauderdale County* (1882), 10 F. 460; this case involved a Tennessee statute which stated that "every officer shall hold his office until his successor is elected or appointed and qualified."

The rationale of the *Badger, Green,* and *Lauderdale* cases is that the acceptance by an individual of a public office and the awarding of this office upon an individual is "the imposition of a public trust by agreement between the State and the officeholder. Why may not the state attach as a condition to the bestowal of the honors and compensation growing out of the trust, that it shall not be surrendered until the state has designated a successor, so that the public interests shall not suffer?" That rationale appears to be good, consistent, and legally sound insofar as it relates to the Illinois, the Missouri, and the Tennessee statutes. However, it is not sound and it cannot be made applicable to the Alabama statute. To hold that Registrars Livingston and Rogers entered into an agreement with the State of Alabama, when they accepted the appointment of registrars of Macon County, to the effect that they "shall" or "must" or "would" continue in said office until their successors had been appointed and qualified would be to disregard completely the wording of the Alabama statute.

To so hold would be to disregard completely the intent of the Legislature of the State of Alabama, which intent is manifested by the wording of that statute.

To so hold would be to disregard completely § 160, Title 41 of the 1940 Code of Alabama, as amended,[11]

[11] "§ 160. *How offices are vacated.*—Any office in this state is vacated:

"By the death of the incumbent.

"By his resignation, except in such cases as are excepted by law.

[Continued on next page]

which statute specifically recognizes and provides that such offices can be vacated "by * * * resignation, except in such cases as are excepted by law." There are no exceptions in the case of registrars. In this connection, see *Amy* v. *Watertown* (1888), 130 U.S. 301, 316, in which case the Supreme Court recognized that the statute law of Wisconsin providing for the procedure to be followed in cases of resignation "was decisive" and "preclude the operation of any such rule as was recognized in *Badger* v. *Bolles* * * *."

Under the Alabama law, Registrars Livingston and Rogers (as well as any other registrars that accept an appointment while § 22 of Title 17 is in effect) accepted their appointments and agreed to serve "at the will of the appointing board" and with the understanding that they could be removed at any time by a majority of the appointing board (the governor, auditor and commissioner of agriculture and industries) "with or without cause and without giving their reasons therefor." For this Court to follow the *Badger*, the *Green*, and the *Lauderdale* cases and to apply the rationale of those cases to this case would also mean that the registrar who accepted a position under a statute which said he "may hold office for four years" (subject to removal at the possible whim of the appointing board) could not for reasons of health or business, or other good and substantial reasons, in good faith terminate his office by resignation until the appointing authority decided to

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"By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed.

"By the decision of a competent tribunal declaring his election or appointment void, or his office vacant.

"By the act of the legislature abridging his term of office, when the same is not fixed by the constitution.

"In such other cases as are or may be declared by law."

appoint his successor and until his successor got around to qualifying. This Court must and does now hold that the Legislature of the State of Alabama, in using the word "may" intended that the registrars not be required to hold office for four years from the time of their appointment, but they "may" be removed with or without cause by the appointing board and that they "may" in good faith resign their office. Such an interpretation works no great hardship upon anyone. It does not permit any widespread conspiracy to defeat the law, it does not necessarily permit the paralyzation of governmental functions that are necessary to organized society, and it does not permit any "hiatus or interregnum," since the remedy of mandamus, if the circumstances warrant and justify its use, is always available to require the appointing board to fill, if they refuse to act within a reasonable time, any vacancies that may be created, such as these.

Nothing stated in this opinion should be construed to mean that this Court sanctions or will sanction the proposition (here unnecessarily advanced by Livingston and Rogers) that registrars are free to resign at will, indiscriminately and in bad faith, and thereby cast off all of their responsibilities and obligations as such officers.

The Defendant "The Board of Registrars of Macon County, Alabama":

The next category of points raised by the motion to dismiss relates only to the defendant "The Board of Registrars of Macon County, Alabama." It is contended that this Court has no jurisdiction over the Board of Registrars as such, because, first, said Board is not in fact or in law a separate suable legal entity, and, second, the Board is not a "person" within the

meaning of that section of the Civil Rights Act authorizing preventive relief suits such as this one.[12]

Registration in Alabama is provided for in § 186 of the Alabama Constitution of 1901 and Title 17, § 21 of the 1940 Code of Alabama, as amended.[13] It is the individuals on the Board, and not the Board itself, that conduct the registration; it is the individuals on the Board who may by their "acts and practices" deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote. Therefore, it is the *individual* officers that preventive relief—here in the form of injunctions—must be obtained against.

In *Handy Cafe, Inc.* v. *Justices of the Superior Court, et al.* (1st Cir., 1957), 248 F. 2d 48, cert. den. March 10, 1958, 356 U.S. 902, the plaintiff sued, under § 1983, Title 42, U.S.C.A.[14] (an old Civil Rights statute), "the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts." Plaintiff there claimed deprivation of certain constitutional rights by those defendants, under color of their respective offices and that it (the plaintiff) had been denied the equal protection of the laws, contrary to the Fourteenth Amendment.

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[12] Sec. 1971(c), Title 42, U.S.C.A.

[13] The pertinent part of that Code section being set out in footnote 2.

[14] "Every person who, under color of any statute, ordinance, regulation or custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable * * *."

The plaintiff there sought declaratory relief and an injunction.

With reference to whether or not "the members of the Superior Court and Supreme Judicial Court" constituted a suable legal entity, the First Circuit Court of Appeals in a *per curiam* opinion [15] stated:

> In addition to the foregoing, we are bound to observe that we know of no authority to the effect that "the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts" constitute suable legal entities. Action under the Civil Rights Act must be against the individual persons or officials who, under color of their respective state offices, subject a person to denial of federal constitutional rights. There are over thirty judges of the Massachusetts Superior Court throughout the Commonwealth and seven justices of the Supreme Judicial Court. Obviously not all of these persons could have been concerned with the various state court proceedings herein complained of. It does not appear against which individuals judgments for damages and enforcement orders are sought to be issued.
>
> All in all, we regard this as a completely preposterous case.

Also in point here is the case of *Hewitt* v. *City of Jacksonville* (1951, 5th Cir.), 188 F. 2d 422, where the court, speaking through Judge Holmes, said:

> The lower court, in refusing to allow the amended complaint to be filed, held that the word "persons" used in the Civil Rights statute, 8 U.S.C.A. § 43, *does not include a State* or its governmental subdivisions acting in their sovereign * * * capacity." [Emphasis added.]

[15] Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges, sitting.

> We are in accord with the views expressed by the lower court;

See also the Fifth Circuit case of *Charlton* v. *City of Hialeah* (1951), 188 F. 2d 421, which followed the *Hewitt* v. *Jacksonville* decision.

Even though these cases involved another Civil Rights statute, this Court is of the opinion that the reasoning and conclusions reached are sound and should be applied in this case to plaintiff's action against "The Board of Registrars of Macon County, Alabama."

The Defendant State of Alabama:

The motion to dismiss filed by the State of Alabama contains some fifty-eight grounds. These grounds fall into five general categories. They are:

(1) Civil Rights Act of 1957 authorizes actions only against "individual persons" and not states.

(2) States have exclusive jurisdiction in the field of voting by reason of the Tenth and Eleventh Amendments to the Constitution of the United States.

(3) Supreme Court of the United States has original and exclusive jurisdiction in cases involving sovereign states.

(4) Civil Rights Act of 1957 (particularly Part IV) is unconstitutional.

(5) Even if this Court determines that it has jurisdiction and determines that the Act is constitutional, it should refrain from exercising jurisdiction in this case because of comity.

Category two is obviously without merit. Part of what this Court said in the case of *In re: George C. Wallace, et al.*, 170 F. Supp. 63 (decided January 9, 1959), is applicable in this case and is dispositive of these points:

The authority delegated to the Federal Government by the Fifteenth Amendment to the Constitution of the United States is undoubtedly the authority under which the Congress of the United States was acting when the Civil Rights Act of 1957 was passed. The provision in the Act providing for investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered to be an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin. That part of the Act is, therefore, by this Court considered "appropriate legislation" within the meaning of Section 2 of the Fifteenth Amendment.

The sovereignty of the State of Alabama, or of any other of the states, must yield, therefore, to this expression of the Congress of the United States, since this expression of Congress—by this Act—was passed in a proper exercise of a power specifically delegated to the Federal Government, and the Court cites *Ex Parte Siebold*, 100 U.S. 371. This is necessarily true even though the states possess concurrent legislative jurisdiction with respect to voting, since the Federal Government, and its law, is supreme in this area. The Court cites *Kohl* v. *United States*, 91 U.S. 367.

The concept of the sovereignty of the states is embodied in the Tenth Amendment to the Constitution of the United States, this amendment providing that those powers are reserved to the states which have not been "delegated to the United States by the Constitution, nor prohibited by it to the States."

Here we have involved the very powers which the Constitution of the United States says are not reserved to the states. See *United States* v. *Reese*, 92 U.S. 214; *United States* v. *Darby*, 312 U.S. 100; and *Fernandez* v. *Wiener*, 326 U.S. 340.

> The fact that the State of Alabama voting and registration records are involved in this case does not alter the legal principle at all. *In re: Cohen,* 62 F. 2d 249; *United States* v. *Ponder,* 238 F. 2d 825; *Endicott Johnson Corporation* v. *Perkins,* 317 U.S. 501.
>
> Thus, it must be generally concluded, and this Court now concludes, that since the Congress of the United States did have the authority to pass the Civil Rights Act of 1957 and that said authority is supreme in this field as opposed to any authority of the states, and since the Commission on Civil Rights was in issuing the subpoenas in question acting pursuant to that Act, and since this Court was in issuing its order upon the application of the Attorney General of the United States also acting pursuant to said Act, the contention that movants make that enforcement of the subpoenas will constitute an illegal invasion of the sovereignty of the State of Alabama and the contention that this Court is without jurisdiction to enforce compliance with said subpoenas are without merit and cannot stand.

As to defendant's contention that the Supreme Court has original jurisdiction, there is no question. See Article III, § 2 of the Constitution of the United States. Also *United States* v. *West Virginia,* 295 U.S. 463, 470, and *United States* v. *California,* 297 U.S. 175, 187. However, it is not true that this jurisdiction is exclusive. In the *California* case, supra, the Supreme Court held that venue properly lay in the district court in California in an appropriate case. See also *New York* v. *United States,* 326 U.S. 572, and *Colorado* v. *United States,* 219 F. 2d 474. Here, there is in 42 U.S.C.A. § 1971 (c) and (d), specific and unambiguous Congressional authorization for actions such as this one to be commenced in this Court.

Because of the conclusions hereinafter reached by

this Court in connection with the State's motion and in keeping with the duty of any court to avoid constitutional questions unless essential to a proper disposition of a case,[16] this Court will not, at this time, pass upon the question of the constitutionality of Part IV of the Civil Rights Act of 1957. It is also unnecessary to discuss in this opinion the objections of the State upon the ground of comity.

The category of objections remaining concern the question of whether or not the Civil Rights Act of 1957 authorizes actions for preventive relief by the Attorney General against states. Without any doubt, the Congress of the United States had the authority to grant such a right.[17] The question here is: Did it confer that authority in this Act? This Court is of the opinion that Congress did not intend for such actions against states to be authorized by this Act.

There is no doubt that such authority would be appropriate—and even in certain circumstances necessary—if Congress intended to give full and complete authority to the Attorney General of the United States to enforce the constitutional rights here involved. This Court judicially knows that the Civil Rights Act of 1957 was a compromise measure and the compromise reflected an intention on the part of Congress to give limited authority—as opposed to full and complete authority—in this field. A reading of the legislative history of this Act impresses this Court with the fact that if it had then been mentioned that this Act authorized the United States to sue a state for preventive relief, the Act would not yet be

[16] For two recent cases reiterating this proposition see: *Harmon* v. *Brucker* (1958), 355 U.S. 579, 581, and *Byers* v. *Byers* (C.C.A. 5, 1958), 254 F. 2d 205, 208.

[17] See the reasoning of this Court on the authority of the Federal Government in the field of voting in the case of *In re George C. Wallace et al.*, supra.

passed.[18] As a matter of fact, it is very definitely inferred by the following statement of Attorney General Brownell that the Act was only to be used to obtain preventive relief against individual persons:[19]

> Mr. BROWNELL. It is my opinion that the bill before you from which you quoted does not increase the Department's jurisdiction in connection with State primary elections. At the present time, our jurisdiction is limited to commencing criminal proceedings under sections 241 and 242, which are the criminal provisions of the civil-rights laws. Under 242, it is necessary that the wrongdoer be a State officer. In other words, that he be acting under color of law. Under section 241, you have to prove a conspiracy. The statute operates only against conspirators, in other words.

The Court must presume, therefore, that Congress in using only the word "person" deliberately restricted the authority of the Attorney General to institute such actions. Such reasoning as now used and the conclusion as is now reached is analogous to the reasoning and conclusion of the Supreme Court of the United States in *United States* v. *Mine Workers* (1947) 330 U.S. 258, 275. In that case, the court held, among other things, that the Norris-LaGuardia Act did not apply to the "Government in all cases" and observed:

> The Act does not define "persons." In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so * * *. The absence of any comparable provision extending the term

[18] In this connection, see the testimony and statements of Attorney General Brownell before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-fifth Congress, at pages 570, 589, 590, 591, 599, and 602.

[19] Ibid, page 606.

to *sovereign governments* implies that Congress did not desire the term to extend to *them*. [Emphasis added.]

In accordance with the foregoing, an appropriate order will be entered dismissing this action as to each of the defendants.

Since the action is to be dismissed as to all defendants, the motion to produce, as to each of them and their objections thereto, and the motion to strike and quash service are moot.

Done, this the 6th day of March, 1959.

FRANK M. JOHNSON, JR.,
United States District Judge.

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

No. 17684

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF ALABAMA, ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Alabama

(June 16, 1959)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges

HUTCHESON, *Chief Judge:* This appeal tests for error the order of the district judge dismissing the complaint as to all the defendants for the reasons stated in his opinion [1] as to each.

This is the record. On February 5, 1959, the United States of America, appellant, filed an action against appellees Grady Rogers, E. P. Livingston, and the Registration Board of Macon County, Alabama. This action was brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S. Code, sec. 1971) [2] to obtain preventive relief against

[1] *United States of America* v. *State of Alabama, et al.*, 171 F. Supp. 720.

[2] Sec. 1971(c): "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to

certain act and practices which deprive citizens of their right to vote on account of race or color.

The complaint specifically alleged the following facts. The appellees, the Registration Board and Rogers and Livingston, sued as members, who, under Alabama law are responsible for registering qualified citizens for voting, have engaged in certain discriminatory acts and practices. Among those practices are the maintenance of separate and segregated registration facilities for negroes; the application of more stringent and more rigid registration standards to negroes than to whites; and various other acts and practices which clearly set forth denial of registration to vote solely on account of race or color. Such discriminatory acts and practices have brought about and perpetuated a great disparity between the respective percentages of white and negro citizens of voting age registered to vote in Macon County, Alabama, despite the fact that negro citizens of voting age in Macon County greatly outnumber white citizens of voting age.[3]

Appellees Rogers and Livingston, who are *not before*

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engage in any act or practice which would deprive any other person of any right or privilege secured by subsec. (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

[3] In 1958 white citizens of voting age numbered approximately 3,100, whereas negro citizens of voting age numbered approximately 14,000. As of Dec. 1, 1958, white citizens registered to vote in Macon County numbered approximately 3,016, or approximately 97% of the white population of voting age; and the negro citizens registered to vote in Macon County numbered approximately 1,100, or approximately 8% of the negro population of voting age (Complaint, par. 8, 9, R. 3).

the court as individuals but only as members of the Board of Registration, resigned as registrars of Macon County in Dec., 1958, some two months before this suit was filed. Their resignations were absolute and unconditional, and it was shown by affidavits, depositions and documents, that neither intended to serve again as a member of the Board of Registration, that their resignations had been accepted by the appointing board, and that each had accepted and qualified for another public office. The Registration Board, for the purpose of preventing negroes from registering, became inoperative during long periods of time from 1946 to present. The latest paralysis of that office occurred in December 1958 and was caused by the purported resignation of its only two members.

An *injunction* was sought to prevent the above named appellees from engaging in the alleged acts, practices, methods or procedures in whatever form, which discriminate against any applicant for registration for voting in Macon County, Alabama, on account of his race or color.

Subsequently on February 23, 1959, appellant amended the original complaint to include as a party defendant the State of Alabama. This amendment averred that the State of Alabama, through its agents, officials and agencies, had engaged in the discriminatory and unlawful practices specified in the complaint.

The amendment sought a *declaratory judgment* of the illegality of these acts and practices and a judgment "*enjoining* Defendant State of Alabama from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the United States and the decree of this Court".

Appellees filed motions to dismiss.[4] Essentially, appellee State of Alabama objected to the action on the ground that the Civil Rights Act of 1957 does not authorize suits against states but only individual "persons" and that the State is not a "person" within the meaning of the Act; that states have exclusive jurisdiction in the field of voting by virtue of the Tenth and Eleventh Amendments to the United States Constitution; that in any event the District Court has no jurisdiction over actions involving a state; and that the Civil Rights Act of 1957 is unconstitutional. Appellees Rogers, Livingston, and the Registration Board objected to the complaint on the ground that the suit was improperly brought against Rogers and Livingston because they had effectively resigned their office as registrars; that the Civil Rights Act of 1957 does not authorize suits against the Registration Board but only against individual persons; that the State of Alabama is an indispensable party; that the action is precluded by the Eleventh Amendment to the Constitution; and that the registration board was not a suable entity under the laws of the State of Alabama.

The court below dismissed the complaint as to all defendants. With respect to appellees Rogers and Livingston, it held that they could not be made defendants because their resignations were effective in all respects, and that under the applicable Alabama law registrars have no obligation to continue to serve until successors were appointed to fill that office. The court dismissed as to the Registration Board on the

[4] In addition to the motions to dismiss appellees filed several other motions including a motion to strike and quash service, an answer or objection to the motion to produce, and a motion to dissolve the temporary restraining order. The issues on these subsidiary motions were essentially the same as on the motions to dismiss.

grounds that it was not a suable legal entity under Alabama law and that in any event the Civil Rights Act of 1957 does not authorize suit against such a board, but permits a suit only against individual persons as members of the Board.

The court held that the action would not lie against the State of Alabama, on the ground that the Civil Rights Act of 1957 did not authorize a suit against a state. Having held, for the reasons stated as to each, that none of the defendants were subject to the suit, the court entered a judgment dismissing it as to each.

Appealing therefrom, plaintiff-appellant is here urging against the judgment three specifications of error:

> 1. The district Court erred in holding that 42 U.S.C. 1971(c) does not permit the Attorney General to bring an action against the State of Alabama or the Board of Registrars of Macon County, Alabama.
>
> 2. The District Court erred in holding that an action under the Civil Rights Act of 1957 will not lie against registrars who have purported to resign their office, but for whom no successors have been appointed.
>
> 3. The District Court erred in holding that the Board of Registrars of Macon County, Alabama, is not a suable legal entity.

and seeking its reversal.

Paramounting the first specification, that the court erred in holding that the statute upon which the suit was based does not permit the Attorney General to bring an action against the *State* of Alabama, appellant devotes the major portion of its brief to a discussion and argument which, not confining itself to an interpretation and construction of the statute, but, taking far wider range, undertakes to discuss not the

actualities of the jurisdiction claimed to have been conferred by the statute but the possibilities in general of conferring upon the federal courts jurisdiction of an action against a state of the kind asserted here.

Interesting and engaging as these speculations are, we will not indulge in them here, but, confining ourselves to the sole question for determination, whether the statute supports the jurisdiction asserted, we will state simply but categorically that we agree with the district judge that neither on its face nor in its history, taken alone or in connection with civil rights legislation in general, is there any reasonable basis for holding that, in providing "whenever any person, * * *", the congress intended to, or did, provide for suit against a sovereign state.

Without elaborating upon it, as under the settled law of the cases we could do in extenso, it is sufficient for us to simply say that, under the principle which has been, and still is, controlling upon the federal courts, whatever congress might or could do in providing in a civil rights action for conferring federal court jurisdiction over a state, it has never heretofore done so and it has not in terms done so in the statute invoked here.

Absent such specific conferring of jurisdiction, a federal court would not, indeed could not, assume jurisdiction over a sovereign state without a precedent determination that, though the jurisdiction had not been expressly conferred, the language of the invoked statute carried the necessary, the unavoidable implication that the congress upon the gravest considerations and after the utmost thought and deliberation had intended to and did confer it.

Reading the statute as one will, such an implication cannot be found in it. For it cannot be reasonably contended that the congress intended in a situation of

this kind, where both the complaint and the Alabama statutes themselves, of which we take judicial knowledge, plainly show, that no exception or objection is, or can be, made on any kind of constitutional grounds to the will of the state there expressed, or that there is any need for, or justice in, finding authority under this statute to sue the state itself for the wrongs upon the statute and upon it perpetrated by its allegedly unfaithful servants. Indeed, the gravamen of the complaint against the officers of the state who subvert and pervert the state's will, as expressed in its statutes,[5] is that defendants Rogers and Livingston, "in

[5] In *Constantin* v. *Smith*, a suit against the governor of the State of Texas, 57 F. (2) 227, affirmed in *Sterling, Governor of Texas* v. *Constantin*, 287 U.S. 378, the court thus clearly and correctly stated the principles controlling in civil rights suits such as this one:

"Upon the first proposition advanced, that this is a suit against the state, and that as such it may not be maintained the authorities overwhelm: that this is a suit under the first subdivision of Sec. 41, 28 U.S.C.A., Sec. 24, Subd. 1 of the Judicial Code, to redress the deprivation of property arising under the Constitution and laws of the United States (*Holt* v. *Indiana Mfg. Co.*, 176 U.S. 70). As such it is not a suit against the state, but against persons in their individual capacities, to prevent them from enforcing statutes in themselves unconstitutional, or unconstitutional as attempted to be enforced and applied. In such a suit, when it is found, that 'an individual, acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to import to him any immunity from responsibility to the supreme authority of the United States.' *Ex parte Ayers*, 123 U.S. 507; *Reagan* v. *Farmers' Loan & Tr. Co.*, 154 U.S. 362; *Ex parte Young*, 209 U.S. 123; *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Truax* v. *Raich*, 239 U.S. 33; *Greene* v. *Louisville & Int. R.R.*, 244 U.S. 507; *McMilan* v. *Comm.*, 51 F. (2) 400; *McLeaish* v. *Binford*,

the course of their official duties have discriminated against qualified Negro citizens on account of their race or color, and a judgment is sought declaring such past acts and practices to be illegal under the constitution and laws of the United States. Further an order is sought enjoining said defendants so long as they remain responsible for the duties of their office and their successors when appointed and qualified from engaging in such illegal acts and practices in the future."

We thus come to the second specification of error that, though, as the district judge expressly found, the two, sued as board members, had, some two months before the suit was brought, in good faith resigned their offices and each has taken another state office, they can and should be treated as still members of the board, to say of it that we think the short and simple answer to it is that the supposed need for someone to sue cannot be made, as appellant seeks to make it, to serve as a valid reason for rejecting out of hand

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52 F. (2) 151. In this suit plaintiffs invoke the exercise of the judicial power of the United States which, vested by the Constitution in its courts, extends to all cases of law and equity arising thereunder. * * *"

"No exertion of this power rests on clearer or more certain grounds than that of its chancery jurisdiction. * * *"

"Of the chancery jurisdiction no phase of it has a better settled basis, a more comprehensive and remedial scope than that which it employs to prevent persons, acting under the authority or color of state laws, from denying the due process and equal protection which the Fourteenth Amendment guarantees. This must necessarily be so, for, independent of each other in their respective spheres as are the state and federal governments, the Constitution of the United States is the supreme law of the land, and the courts of the United States, as the repositories of federal judicial power, are compelled to and will assert and vindicate its supremacy, to protect the rights of individuals menaced by personal aggression masked under official power. * * *"

the general principle, which underlies and conditions, existence and exercise of jurisdiction over a person sued in a particular capacity, that such person has that capacity.

In addition to pointing out, as the district judge did, that the remedy does not lie in perverting jurisdictional processes by means and to ends as injudicious as they are unjudicial, by holding one who is not an officer responsible as such, but that it lies in taking appropriate action under *Alabama law* to compel those authorized to, and responsible for, constituting and filling vacancies in the membership of the Board of Registrars to fill those offices, it is sufficient to say that these considerations aside, we are of the clear opinion that the reasons given by the district judge for rejecting this contention of plaintiff-appellant are sound, indeed unanswerable, and that we approve and adopt them.

Of the third and final specification, that the Board of Registrars, without members to be sued or served, constituted a legal entity which must stand in judgment in this suit, we think we need do no more than say that no sound argument is presented or authorities cited against the decision reached and the judgment entered by the district judge. Indeed, no argument is presented in support of the action which the court below was asked, but refused, to take, that is to assume jurisdiction over a board without members, a jurisdiction which, for lack of process it did not and could not assert, except the same argument of Necessity or Desirability made in connection with the second specification. Putting to one side: that such an argument may not serve other than as a cautionary warning against too readily accepting an apparently wrong result as a right one; that it can never take the place of, or serve as real grounds for assert-

ing, jurisdiction, to point out, as the district judge did, that the remedy lies not in trying to sue a memberless board *but in a suit against the appointing officers of the state* to require the appointment of members to the board, we think it beyond any doubt that there is no basis for the claim that, in ruling as he did, for the reasons that he gave, the district judge in any way erred.

Stating: "It is the individuals on the Board and not the Board itself that conduct the registration; it is the individuals on the Board who may by their 'acts and practices' deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote, therefore, it is for the individual officers that preventive relief—here in the form of injunctions—must be obtained against.", the district judge, citing *Handy Cafe, Ins.* v. *Justices,* 248 F. (2) 485; *Hewitt* v. *City of Jackson,* 188 F. (2) 423; and *Charleston* v. *City of Hialiah,* 188 F. (2) 421, to which may be added *McSwan* v. *County Board,* 104 F. Supp. 861, *Gerald Graves* v. *City of Boliver,* 154 F. Supp. 625, correctly we think, appraised the legal situation arising on the facts and correctly denied the relief asked. In reaching this conclusion we have not overlooked or disregarded *Garner* v. *McCall* (Ala.), 178 So. 210 and *Boswell* v. *Bethea* (Ala.), 5 So. (2) 816, cited by the appellant as requiring a contrary ruling. We think appellant's reliance on them will not at all do. Indeed, we think that the Boswell case which dealt with an appeal from a judgment of the Circuit Court in a suit against the Board of Registrars, composed of the three members, naming them, explicitly confirms the position of the district judge that, suing a board hav-

ing no members is as inconceivable in law as suing, as members of a board, persons who are not such, and that under the facts established and found, the judgment must be affirmed.

Affirmed.

In the United States Court of Appeals for the Fifth Circuit

JUDGMENT

[Extract from the Minutes of June 16, 1959]

No. 17684

UNITED STATES OF AMERICA

v.

STATE OF ALABAMA, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA,
Petitioner
V.
STATE OF ALABAMA, et al.

Reply To
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO.

UNITED STATES OF AMERICA, Petitioner

v.

STATE OF ALABAMA, et al.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Middle District of Alabama was adverse to Petitioner, and Petitioner appealed therefrom to the Court of Appeals. That opinion is reported at 171 F. Supp. 720 and is set out as Appendix A to the Government's petition. The opinion of the Court of Appeals was also adverse to Petitioner. That opinion is reported at 267 F. 2d. 808 and is set out as Appendix B to the Petition.

STATEMENT OF THE CASE

The case is succinctly stated by the pleadings and sufficiently summarized in the opinions below.

However, with the exception of the few additions here noted, Defendants accept the general statement

of the case as set out by Appellant. That statement should be amplified to show the following:

Defandants Rogers and Livingston resigned and gave written notices of their resignations to the appointing authorities **approximately two months before this case was filed.** Their resignations were absolute and unconditional and were made in good faith. It was shown that neither intends to serve again as a member of the Board of Registrars; that their resignations were accepted by the appointing board, and that both hold other public offices, each having qualified and begun serving in his public office (R. 73-78; see also Opinion of Court of Appeals at page 33 of Petition).

The defendant "Board of Registrars of Macon County, Alabama," is not before the Court and never has been as it was never served (even if it be a suable, legal entity and both lower courts held that it was not such an entity under Alabama law). The only purported service was upon a person who was not then a registrar, nor an agent, of the Board (R. 53).

At page 4 of the Petition, it is stated that the amended complaint avers that the State of Alabama, through its agents, officials, and agencies, had engaged in discriminatory and unlawful practices. Attention is called to further allegations of the complaint which set out certain applicable laws of the State of Alabama specifically. (Of course, these and other applicable State laws are within the judicial knowledge of the Court anyway.) The Alabama law specifically forbids discrimination between applicants for voting. See Section 31 of Title 17, Code of Alabama, referred to in Petitioner's complaint at page 2(a) of the appendix to the complaint (R. 10). The complaint shows on

its face by this specific allegation that if there be any discrimination against any applicant for registration, such discrimination is unauthorized under the laws of the State of Alabama and is completely ultra vires, being merely the individual action of some person or officer and not the act of the State; such action as complained of cannot be the action of an agent acting within the line and scope of his authority for and on behalf of the State of Alabama.

QUESTIONS PRESENTED

The question as stated by petitioner is not squarely presented by the case at bar. The question of whether a **State** (as distinguished from the individual state officials who may be committing the alleged wrong) can be directly enjoined in a suit brought by the Attorney General under the Civil Rights Act of 1957 is of great importance, of course. However, this case is hardly the appropriate case to present this question or, indeed, the real basic, primary, and fundamental question, viz: **Is the Civil Rights Act of 1957 Constitutional?** The constitutionality of the Act was challenged by defendants below, but both lower courts decided the cause without considering that basic question (District Court Opinion, App. A, top of page 28 of Petition).

Moreover, the question, as stated by Petitioner (see page 5 of Petition), arises from the unique or unusual situation peculiar to this case only; a situation which will limit the general or universal considerations. As expressed by Petitioner at Page 5 of the Petition, the question in the instant case is whether the Civil Rights Act of 1957 authorizes injunctive relief directly against a State where: (1) The individual board members had effectively resigned prior to the

institution of this action, and (2) the Board of Registrars is not a legal or suable entity. The two lower courts have found as a mixed question of fact and local Alabama law that the individual registrars had in fact effectively resigned prior to the institution of the action and that in this instance the Board of Registrars was not a suable entity.

ARGUMENT

The carefully prepared opinions of the Trial Court and of the Circuit Court of Appeals amply show the correctness of the judgment entered. Not only is the legal question presented by this case too limited to be of general importance, but it is clear from the opinions of these two courts below that their decisions are sound and just. No corrective action by this Court is required.

Neither the Trial Court nor the Court of Appeals found it necessary to consider the grave question of the constitutionality of the Civil Rights Act. This fundamental legal proposition has been raised directly in at least one case already decided by a district court, and counsel for defendants understand those cases are pending for review by this Court. Those cases should be decided instead of, or at least before, this particular case or any case so limited as in this case.

Registration is conducted by individual officials. If they are guilty of discrimination, the action can and should be brought against those individuals. This gives ample remedy to petitioner and refutes any idea of urgency or necessity for this procedure and also demonstrates the impropriety or lack of necessity for suing a State in its sovereign capacity, particularly where

the State laws directly forbid the discrimination complained of.

Furthermore, as is pointed out in the opinions of the Trial Court and Court of Appeals, the Civil Rights Act of 1957 has been sufficiently interpreted by the Courts to make it clear that the remedies contemplated by the Civil Rights Act are against "persons" and not against "States." See the cases cited in the Opinions of the lower courts, App. A and B, pages 28 and 60 of the Petition. The courts have already adjudicated the question of whether the Civil Rights Act authorizes suits against individual persons only, or **the source of their authority as well.** Indeed, this Honorable Court has already denied certiorari of a case presenting this identical question. **Handy Cafe, Inc. v. Justices of the Superior Court, et. al.** (1st Cir. 1957), 248 F. 2d. 485, Cert. Den. March 10, 1958, 356 U. S. 902.

Part IV of the Civil Rights Act of 1957 in paragraph (c) (P. L. 85-315, 71 Stat. 634, 42 U.S.C., Supp. V. (1971(c)) contains whatever authority the Attorney General possesses for instituting suit (the applicable provision is set out in the Petition beginning on the bottom of page 2). The word "person" means an individual person and does not inferentially include a State: A word is generally given the same meaning wherever it is found in a particular statute. Quoting the applicable portion of the statute, "whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive **any other person** of any right or privilege" respecting voting. A State of course cannot vote. Obviously, only an individual person possesses the right or privilege secured by subsection (a) or (b) of the section, which is the right of

an individual person to vote. Therefore, when the word "person" is used throughout the statute, it means, of necessity, an individual person, and cannot include a State.

Had it been intended that States could be made parties defendant under the Civil Rights Act, Congress would have worded Section 137, paragraph (d) differently. This is the paragraph conferring jurisdiction on the District Courts; it is well known that the Constitution of the United States in Article III, Section 2, gives the Supreme Court of the United States original jurisdiction (but not necessarily exclusive jurisdiction) in proceedings against States. The wording of this provision would be an attempt to oust the Supreme Court of its concurrent original jurisdiction if States could be made parties, as the Act provides for original jurisdiction in the District Courts only. Obviously, it was never intended that actions under the Civil Rights Act be brought directly against States.

Moreover, the Act speaks of "practices which would deprive any other person of any right or privilege . . .," and the "party aggrieved." The obvious purpose of paragraph (c) added by the 1957 Amendment was to authorize the Attorney General to institute a civil action for preventive relief for or in behalf of those persons threatened with a deprivation of their constitutional voting rights. To permit such an action directly against a State would be an attempted evasion of Article XI of the Constitution, which prohibits suits by citizens against the States.

It is apparent that the United States has no direct interest in spite of the general wording of the provision of paragraph (c) of Section 1971, under which this action is brought. In that connection, we refer the

Court to the testimony of Mr. Brownell in the Civil Rights hearings before Subcommittee No. 5 in February, 1957, at page 599, where this testimony appears:

> "The Chairman. But it says for the benefit of the real party in interest.
>
> Mr. Brownell. Or for the benefit of the real party in interest.
>
> The Chairman. Suppose the individual brought his own action. Could you intervene in that case under these provisions?
>
> Mr. Brownell. Yes . . . "

And on page 602.

> "Mr. Miller. Would there be any objection of the Department of the inclusion in the bill just a simple provision that where the Attorney General instituted the action in the name or for the benefit of the real party in interest, that it be with his consent?
>
> Mr. Brownell. I would think it might be misleading to do that, . . . "

To clinch the assertion that the real party in interest is not the United States, but certain citizens of the State of Alabama, please examine the wording of paragraph (d) of Section 1971, which purports to give this Court jurisdiction. There it clearly says that "the party aggrieved" need not exhaust his administrative or other remedies before suit is brought. Who is the party aggrieved? It must of necessity be these complaining witnesses. That being so, this is a suit by the

United States for and on behalf of certain individual citizens of the State of Alabama. Then there is no justifiable controversy or actual controversy between the parties. The United States has no proprietary interest or any real interest. The real party in interest are these citizens. For that reason a district court should not take jurisdiction of the matter as courts do not entertain suits that are moot as to the parties, or where the parties before the court have no direct interest. Judicial power of courts is always limited to actual controversies by adverse litigants.

Of more importance, it is clear that under the case of **Hans v. State of Louisiana,** 134 U. S. 842, 33 L. Ed. 177, a citizen of a State cannot sue his own State in a district court. Sometimes this is said to be controlled by the 11th Amendment, but at any rate it is settled law that district courts will not take jurisdiction of suits against a State by a citizen of that State. Therefore, it surely follows that, if the real parties in interest, that is "the aggrieved parties," are citizens of the State of Alabama, Congress did not intend that a State should be sued by a citizen through the United States, only a nominal party, as an evasive device to get around the guarantee of the 11th Amendment granting States immunity from such suits. This further substantiates the view that Congress never intended that a State should be made a party defendant under Civil Rights proceedings.

The public official who denies any other person his constitutional rights is acting personally and not as an agent for the State; particularly so in this instance where the Alabama law itself expressly forbids any discrimination between applicants for registration. The general law has been settled for years.

When State officials are acting in an unconstitutional or otherwise illegal manner, they are not regarded as acting for the State, either in its sovereign or governmental capacity, and they may be enjoined if the ordinary remedies of law are inadequate.

Such discrimination as complained of is ultra vires and beyond the scope of the official's authority, outside his jurisdiction and unlawful or without authority. Such action is personal; not State action. Quoting from the opinion of the Supreme Court of the United States in **Ex parte Young,** 209 U. S. 123, page 159:

> The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.' "

Not only is this precedent controlling as such, but

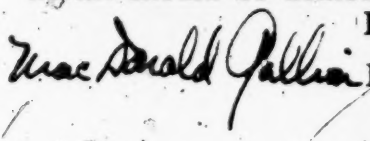
it was well known to Congress when the Civil Rights Act was first passed, and when it was amended in 1957. Had they intended to include States as parties to actions for preventive relief, they would have said so.

CONCLUSION

The correctness of opinions of the lower courts is self-evident. Furthermore the particular questions presented by this case do not reach the fundamental question of the constitutionality of the Civil Rights Act of 1957. The question presented is of limited scope and importance because of the peculiar circumstances of the instant case. The Petition seeks to have this Court legislate rather than review the issues of a litigated case.

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, MacDonald Gallion, Attorney for the Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of October, 1959, I served copies of the foregoing brief in opposition on J. Lee Rankin, Solicitor General, United States of America, Washington, D. C., by placing a copy in a duly addressed envelope with first class postage prepaid in the United States Post Office at Montgomery, Alabama.

I further certify that this brief in opposition is presented in good faith and not for delay.

Mac Donald Gallion

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No. 338

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 398

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama is reported at 171 F. Supp. 720 (R. 79–94). The opinion of the court of appeals is reported at 267 F. 2d 808 (R. 101–108).

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1959 (R. 109). The petition for a writ of certiorari was granted November 16, 1959, 361 U.S. 893 (R. 110). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1957 authorizes the United States to secure equitable relief against a State in order to remove discriminations against Negro citizens unconstitutionally denied the right to vote.

2. Whether, in order to secure the federal voting rights guaranteed by the Constitution and the Civil Rights Act of 1957, voting registrars alleged to have violated such rights may be named as parties defendant where they have purportedly resigned from office and their successors have not been appointed.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States:

> AMENDMENT XV, SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. 1971):

> (a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude;

any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

* * * * *

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

(d) The district court of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

Part V of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 638, 42 U.S.C. 1995):

In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be punished by fine or imprisonment or both: *Provided however,* That in case the accused is a natural person the fine to be paid shall not exceed the sum of $1,000, nor shall imprisonment exceed the term of six months: *Provided further,* That in any such proceeding for criminal contempt, at the discre-

tion of the judge, the accused may be tried with or without a jury: *Provided further, however,* That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to the writs, orders, or process of the court.

Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

STATEMENT

On February 5, 1959, the United States filed an action under Part IV of the Civil Rights Act of 1957 (42 U.S.C. 1971, *supra,* pp. 2–3) against the Board of Registrars of Macon County, Alabama, and against Grady Rogers and E. P. Livingston, as individual members thereof (R. 1–12).

The complaint alleged that certain acts and practices of the respondents deprived citizens of the United States and of the State of Alabama of their right to vote because of their race and that such deprivations constituted violations of the Fifteenth Amendment and of 42 U.S.C. 1971(a) (*supra*, pp. 2–3). In 1958, white citizens of voting age in Macon County, Alabama, numbered approximately 3,100 and Negro citizens of voting age approximately 14,000. About 97 percent of the white citizens of voting age were registered to vote, whereas only about 8 percent of the Negroes were so registered. The complaint alleged that this disparity was brought about and was being perpetuated by the racially discriminatory acts and practices of the defendants (R. 3).

Among these illegal acts and practices were (*a*) the maintenance of separate, segregated registration facilities for Negroes; (*b*) the failure to convene and function as a board of registrars to avoid receiving applications to register from Negroes; (*c*) the maintenance of irregular and unreasonable hours to avoid receiving and processing applications to register from Negroes; (*d*) the application of different and more stringent standards to Negro than to white applicants; (*e*) the following of a policy of delaying the admittance of Negroes, but not of white persons, to the registration office; (*f*) the closing of the registration office provided for Negro applicants while registering white applicants elsewhere; and (*g*) the use of other evasive schemes to avoid receiving and processing applications to register from Negroes (R. 3–5).

The complaint further alleged that the registration board, for the purpose of preventing Negroes from registering, had become inoperative during long periods of time from 1946 to the present (R. 4–5); that the latest paralysis of the board had occurred in December 1958, as a result of the "purported resignation" of respondents Rogers and Livingston, and this paralysis continued at least to the date of the complaint (R. 3, 5); and that the board had refused, for reason of race and color, to register twenty qualified Negro citizens named in the complaint (R. 6–9). Of these twenty persons, twelve hold college degrees, including one who has a doctor of philosophy degree from Boston University and one who has a master of science degree from Columbia University. The others are high school graduates, of whom four are graduate nurses, and one has completed three-and-one-half years toward a degree at Tuskegee Institute (R. 6–7). The complaint sought a declaratory judgment of the illegality of the specified acts and practices and an injunction to prevent future discrimination (R. 7–8).[1]

[1] Subsequently, on February 12, 1959, the United States filed ancillary motions for the discovery of certain records relating to voting registration in Macon County and for a temporary restraining order preventing the destruction of such records (R. 16–24). The United States contended that a restraining order was necessary because the Alabama Senate had passed a bill on February 11—which later became law on February 24 (17 Ala. Code 31)—permitting voting registrars to dispose of records pertaining to unsuccessful applicants as they saw fit (R. 22–24). The district court issued the temporary restraining order on February 12.

On February 23, 1959, the complaint was amended to include the State of Alabama as a party defendant. The amendment alleged that the State "has, for reasons of race or color, persisted in acts and practices which deprive Negro citizens * * * of their rights to vote," and has, acting through its agents and officials, including the Board of Registrars and the two named individual defendants, "engaged in the discriminatory and unlawful practices" specified in the original complaint (see *supra*) (R. 49–50). The amendment sought a judgment declaring that these acts and practices were illegal and enjoining the State "from engaging in such illegal acts and practices in the future and from interfering with the performance of such acts and practices as may be required by the Constitution and laws of the United States and the decree of this Court" (R. 50).

The State and the individual defendants filed separate motions to dismiss (R. 46, 68). The State of Alabama urged that the Civil Rights Act of 1957 authorized suit only against "persons" and that the State is not a person within the meaning of that Act.[2] Defendants Rogers and Livingston urged that, since

[2] The motion also raised over fifty other grounds, among them that the States have exclusive jurisdiction in the field of voting by reason of the Tenth and Eleventh Amendments, that the Supreme Court has original and exclusive jurisdiction in cases involving a State, and that Part IV of the Civil Rights Act of 1957 is unconstitutional (R. 68–76). The district court rejected the first two of these contentions (R. 90–92), but refused to decide whether Part IV was constitutional because such a determination was not necessary to its disposition of the case (R. 92).

they had resigned the office of registrar, the court did not have jurisdiction as to them (R. 47); that the registration board was not a suable legal entity; and that "'The Board of Registrars of Macon County, Alabama,' is in law and in fact the State of Alabama" (R. 46).[3]

The district court dismissed the complaint as to all the defendants. Despite the finding that the resignations of Rogers and Livingston were submitted during "a controversy between the Commission on Civil Rights and certain Alabama officials, including Livingston and Rogers" (R. 82), the court concluded that the resignations were effective and that accordingly Rogers and Livingston could not be sued "in their capacity as registrars of Macon County, Alagama" (R. 83). The court further held that the Board of Registrars was not a suable legal entity (R. 87–89), and that the Civil Rights Act of 1957 did not authorize the Attorney General to bring an action against a State (R. 92–94). The court of appeals affirmed on all grounds (R. 101–108).

SUMMARY OF ARGUMENT

This action was brought against the State of Alabama, the Board of Registrars of Macon County, and two registrars of that Board under subsection (c) of 42 U.S.C. 1971. Subsection (c) was enacted by the Civil Rights Act of 1957 to enforce subsection (a), which guarantees the right to vote against any dis-

[3] Since the motion was filed before the amendment to the complaint, these defendants also urged that the State of Alabama was an indispensable party (R. 47).

crimination because of race or color. The district court dismissed the action, and the court of appeals concurred, on the grounds that the Act did not authorize suit against a State, the Board of Registrars was not a suable entity under Alabama law, and the registrars had effectively resigned under Alabama law before the action was brought. Thus, under the holdings of the courts below, the United States is without remedy to prevent the long-continued discrimination in Macon County, which unconstitutionally deprives Negro citizens of their right to vote.

I

The court of appeals held that the Civil Rights Act of 1957 did not authorize the Attorney General to bring an action for injunctive relief against a State to vindicate the right of citizens to vote without distinction of race or color. This view was predicated primarily upon the presumption applied by the court that the federal courts cannot assume jurisdiction over a State unless the applicable statute expressly or by "unavoidable" implication confers such jurisdiction. This standard was clearly erroneous.

A. The language and history of subsection (a), which was enacted in 1870, demonstrates that Congress intended this provision to restate and implement the Fifteenth Amendment. Subsection (c) provides machinery for the enforcement of subsection (a). The Fifteenth Amendment, by its express terms and by judicial interpretation, prohibits deprivations of voting rights by the States. Thus, it seems clear that, absent any evidence to the contrary, it must be

presumed that Congress intended subsection (c) also to apply to the States.

B. The language of the statute indicates that Congress intended to reach the States. The wording of statue not only shows a clear intent to implement fully the Fifteenth Amendment, but it also does not even suggest any exemption as to the State. While subsection (c) allows the Attorney General to bring an injunction action when "any person" has deprived another person of his voting rights, it does not state that the action for injunctive relief must be brought against a "person." The statute merely states that the Attorney General may bring "a court action or other proper proceeding for preventive relief" without making any further limitation.

C. It is well established that whether or not States are within the reach of Federal statutes depends upon the legislative environment and purpose. The legislative history of the Civil Rights Act of 1957 reflects an attempt on the part of Congress to give full vitality to the protection of the Fifteenth Amendment and to safeguard the right to vote against interference from any quarter. Indeed, that history demonstrates that Congress expected the Civil Rights Act to solve the particular problem involved here—the resignation of voting registrars in order to prevent the registration of Negro voters. Thus, Congress clearly intended to include the State within the operation of the statute.

D. Finally, even if it be assumed, *arguendo,* that Congress did not clearly express its purpose to reach the State, such intention should be presumed in the absence of convincing legislative history indicating a

contrary purpose. The rule, deeply rooted in the common law and uniformly followed by this Court, is that remedial statutes which are enacted to prevent injury and wrong bind the sovereign even if he is not specifically named. The Civil Rights Act is designed to protect against deprivations of a basic right under a constitutional provision which speaks of the State and its actions. Since there is a total absence of any indication that Congress intended to exempt the States, this remedial statute should not be construed to reach so paradoxical a result, especially since this construction might well leave the United States powerless to redress flagrant and continuing violations of fundamental constitutional rights.

II

Whether or not the State is a proper defendant in an injunction action brought under Section 1971(c), the action was properly brought against the individual defendants. Even if their resignations were effective under state law, the registrars were nonetheless amenable to suit for violations by them of the Civil Rights Act of 1957. The remedial purpose of the Act, and the broad powers conferred on the Attorney General by subsection (c) to secure preventive relief, justify bringing an action against registrars who have themselves deprived citizens of their rights under the Act and the Fifteenth Amendment, even though they have submitted resignations effective under state law, when the State has failed to appoint new registrars to take their place. The federal courts have ample powers to prevent frustration of the high purposes of the Act by considering the resignations

as ineffective for the limited purpose of holding the registrars as proper defendants under the Act.

A. Since the action was brought under a federal statute, the issues here must be determined by reference to federal law. It is well established that federal law will be applied to effectuate the purposes of federal legislation and protect federal rights, *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176, particularly in actions brought in equity. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395. In fashioning the proper federal law, consideration should be given not only to the common law but to the Constitution, federal statutes, and their underlying policies.

At common law, the resignation of a state official became effective upon acceptance by the appointing authority. This rule fully protected the people of the State, to whom the appointing authority was responsible. Where, however, the United States sues under an Act designed to protect rights guaranteed by the Constitution, substantial federal interests are directly involved. For purposes of such an action the State appointing authority, which is not responsible to the national electorate, cannot, by the act of acceptance, validate resignations tendered by subordinate officials who are charged with violations of their federal constitutional and statutory duties.

The appropriate rule, in light of the Constitution and the Civil Rights Act, is that the resignation of a voting registrar is not effective for federal purposes until his successor has been qualified. This is the rule which this Court and other federal courts, in construing conflicting or ambiguous local statutes,

have uniformly and deliberately adopted in order to avoid a hiatus in public office. Applying this principle to the instant case in order to avoid a hiatus which would defeat important federal rights, the registrars' resignations were not effective for purposes of an action brought under the Act and they are proper parties defendant.

B. In any event, the complaint alleged that the individual defendants' purported resignations were made in bad faith for the purpose of avoiding their constitutional duty to register qualified Negroes. It is clear that at common law the resignation of a public official is not effective if its purpose is to avoid the performance of a duty. This rule is fully consistent with federal law and policy, and its application is particularly imperative where the obligation sought to be avoided is one imposed by the Constitution.

The district court, on the basis of affidavits submitted by the defendants, found that their purported resignations were made in good faith. This determination, however, was clearly erroneous. A complaint may not be dismissed without giving the plaintiff an opportunity to offer evidence supporting his allegations "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45–46. The allegations of the complaint here raised a material issue of fact; if proved, they would have rendered the purported resignations ineffective at least for purposes of suit under the Act.

ARGUMENT

INTRODUCTION

This suit was brought by the Attorney General pursuant to 42 U.S.C. 1971(c), *supra*, p. 3, which authorizes actions to secure injunctive relief against deprivation of the rights secured by subsections (a) and (b) of that section. Subsection (a), here involved, which was originally enacted in 1870, guarantees that all qualified United States citizens shall be entitled to vote without distinction of race, color, or previous condition of servitude. Until 1957 this subsection had no direct enforcement provision. Subsection (c) was added by the Civil Rights Act of 1957 in order to provide specific remedies for the deprivation of the rights declared in subsections (a) and (b).

Since enactment of the Civil Rights Act of 1957 the United States has brought a number of actions against voting officials to correct and remedy discriminatory administration of state election laws. Two of these cases are presently pending before this Court. *United States* v. *Raines*, No. 64, this Term; *United States* v. *Thomas*, No. 667, this Term. The complaint in the instant case named as defendants specific state officers and the State of Alabama itself. The courts below held that the officials could not be sued because they had resigned and that the State was not suable under the Act. The following background facts may illuminate the problem before the Court.[4]

[4] These facts are taken from the Report of the Commission on Civil Rights, 1959 (U.S. Govt. Printing Office), pp. 75–92.

In 1950, Macon County Alabama, had a population of 30,561, of whom 25,784 were Negroes and 4,777 were whites. The 1958 voter registration lists, on the other hand, showed 3,102 white voters and only 1,218 Negroes. This disproportion exists in spite of the fact that Macon County ranks first in Alabama in the proportion of its Negroes aged 25 or over who have at least a high school education, and in the percentage of Negroes who hold college degrees. Moreover, Macon County is the seat of the Tuskegee Institute which has been outstanding in the field of higher education for Negroes since it was founded in 1881 by Booker T. Washington.

Macon County Negroes have brought numerous court actions to become registered. After one suit in 1946, all the members of the Board of Registrars of the county resigned and no board functioned publicly for about eighteen months. A new board was formed in January 1948, but no public notice of its existence was given until about four months later, when the resignation of the chairman became known. Scores of Negroes then appeared at the courthouse in Tuskegee to apply for registration. But courthouse officials refused to tell the Negroes where they might find the board. Only when a very fair-complexioned Negro asked the directions was the information provided. On that day, eighteen Negroes applied for registration. The board did not function publicly again for eight months. It again became inoperative for about sixteen months in 1956–1957. And in December 1958, while the Commission on Civil Rights was investigating discriminatory denials of the right to vote in Macon County, the board again became

inoperative by the purported resignations of its only two members.

This technique of vanishing registrars—which has occurred elsewhere in Alabama as well (see *Sellers* v. *Wilson,* 123 F. Supp. 917 (M.D. Ala.))—was only one aspect of the pattern of discrimination in Alabama as a whole and particularly in Macon County. In February 1959, while the present case was pending in the district court, Alabama enacted legislation which provided that registration records are not public records, and that registrars could dispose of the records pertaining to unsuccessful applicants. 17 Ala. Code 31. In effect, this provision permits the destruction of the principal source of evidence in any case which seeks to vindicate the right to vote. In July 1957, a statute was enacted which redistricted the City of Tuskegee to exclude the Negro areas and thus bar Negroes from voting in city elections. Act No. 140, 1957 Sess.[5] And Act No. 526 of that same session proposed a constitutional amendment, which was approved by the voters in December 1957 (Ala. Constitution, Amendment 132), whereby the legislature is empowered to enact laws abolishing Macon County—the effect of which would be to keep political power from the Negro voters of that county. In August 1957, Governor Patterson obtained an injunction[6] against the Tuskegee Civic Association for al-

[5] The validity of this Act is challenged in a case now pending on petition for certiorari. *Gomillion* v. *Lightfoot*, No. 668, this Term.

[6] *Alabama ex rel. Patterson* v. *Tuskegee Civic Association*, 2 Race Relations Law Reporter 1002; Circuit Court, Macon Co., Ala., No. 2157.

leged violation of the state boycott law because Negro members of the community ceased to purchase goods from white merchants, in protest against the legislature's actions. The court dissolved the injunction in June 1958 because of failure to prove that the Civic Association was directing a boycott.[7]

It is in the context of this history that the Congress enacted the Civil Rights Act of 1957. It is in the context of this history that the United States brought this action. And it is in the context of this history that the district court and the court of appeals concluded that the United States is powerless to vindicate the constitutional rights of American citizens in the face of the purported resignations of the registrars.

The decision below, if allowed to stand, could preclude enforcement of the basic right to vote whenever registrars resign or registration boards become inoperative. Such a result, we submit, cannot be reconciled with our concept of constitutional government, in which the States have a constitutional duty to establish an electoral process (Art. IV, Section 4, of the Constitution) providing an opportunity for qualified citizens to vote without distinction of race or color. The States cannot so easily divest themselves of their responsibilities by claiming the unavailability

[7] 3 Race Relations Law Reporter 719. Further examples of discriminatory practices in Alabama in the transportation and other fields, as well as voting, are set forth in the testimony and exhibits incorporated in the Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., pp. 825–870, 873–883, 900–930. And see *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449.

of agents. The Fifteenth Amendment contemplates no such lapse; and Congress provided no such gap in the comprehensive remedial statute it enacted in 1957.

I

SECTION 1971(c) AUTHORIZES THE ATTORNEY GENERAL TO BRING INJUNCTION ACTIONS AGAINST THE STATE

There is clearly no constitutional bar to a suit by the United States against a State. See, *e.g.*, *United States* v. *Texas*, 143 U.S. 621; *United States* v. *California*, 332 U.S. 19; cf. *Monaco* v. *United States*, 292 U.S. 313. Thus, the question here is purely one of statutory construction: whether 42 U.S.C. 1971(c) authorizes the Attorney General to vindicate deprivations of voting rights in violation of the Fifteenth Amendment by a suit against the State itself. The court of appeals held that it would decide this question in the affirmative only if (1) jurisdiction for an action against a State was *expressly* conferred in the statute, or (2) "the language of the invoked statute carried the *necessary*, the *unavoidable* implication that the congress upon the gravest considerations and after the utmost thought and deliberation had intended to and did confer" such jurisdiction (emphasis added) (R. 105). Applying that standard, the court found that the statute did not give the Attorney General authority to bring the action against the State of Alabama.

We submit that the test applied by the court of appeals in ascertaining the meaning of the statute was wholly erroneous; that its interpretation of the statute was incorrect; and that the legislative his-

tory, which the court apparently overlooked,[8] demonstrates that Congress intended the statute to be applied to the States.

A. THE STATUTE IMPLEMENTS THE FIFTEENTH AMENDMENT

It is important to emphasize that the statute here involved was designed to implement Congressional power under the Fifteenth Amendment. Under Section 1971(c) the Attorney eGneral has power to institute actions to vindicate the rights declared in subsection (a). The language and history of subsection (a)—which was passed substantially in its present form on May 31, 1870 (16 Stat. 140), just two months after the Fifteenth Amendment became law—demonstrate conclusively that its purpose was to restate and implement the Fifteenth Amendment. See *infra*, pp. 22–23; see also the Government's main brief in *United States* v. *Raines*, No. 64, this Term, pp. 39–45.[9] Insofar as subsection (c) was the enforcement provision of subsection (a), it, too, had the primary purpose of implementing the Fifteenth

[8] The court of appeals merely said, without elaboration: "we will state simply but categorically, that we agree with the district judge that neither on its face nor in its history, taken alone or in connection with civil rights legislation in general, is there any reasonable basis for holding that * * * congress tended to, or did, provide for suit against a sovereign state" (R. 105). The district court's conclusion concerning the intention of Congress rested upon the unsupported speculation that, since the Act was a compromise, "if it had then been mentioned that this Act authorized the United States to sue a state for preventive relief, the Act would not yet be passed" (R. 93).

[9] Copies of both our main and reply briefs in the *Raines* case have been served on opposing counsel.

Amendment. See *infra*, pp. 25–27; see also the Government's main brief in *Raines, supra*, at pp. 45–55.[10]

The Fifteenth Amendment's "command against such denial or abridgement [of voting rights] is directed to the United States and to the individual states." *Terry* v. *Adams*, 345 U.S. 461, 473 (opinion of Mr. Justice Frankfurter). It has never been seriously argued to the contrary. Problems raised by implementing legislation under this Amendment (and the Fourteenth Amendment)[11] have arisen when the legislation was not confined to state action or when individuals were seeking redress against state officials notwithstanding the bar of the Eleventh Amendment. See, *e.g.*, *James* v. *Bowman*, 190 U.S. 127; *Ex parte Young*, 209 U.S. 123. Indeed, in many of the early cases it was urged that the prohibitions and guarantees of the Fourteenth and Fifteenth Amendments were addressed to and controlled only the States themselves in their complete governmental capacity, and that federal power could be exercised only when the State acted as such. See, *e.g.*, *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278; *Ex parte Virginia*, 100 U.S. 339. While that concept was rejected, the Court has never suggested that a State could not be reached under the Fourteenth or Fifteenth Amend-

[10] Subsection (c) also enforces subsection (b) which was an exercise of Congressional power under Art. I, Sections 2 and 4 of the Constitution.

[11] The issue would be the same under the Fourteenth and Fifteenth Amendments, because, insofar as the question of the amenability of a state to suit is concerned, there is no significant difference between the two Amendments.

ments. On the contrary, in the leading case of *Home Tel. & Tel. Co.* v. *Los Angeles, supra,* 227 U.S. at 286, this Court held:

> * * * the provisions of the [Fourteenth] Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, *of course, to the States,* but also to every person whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted. [Emphasis added.] [12]

In sum, the Fourteenth and Fifteenth Amendments are addressed both to the States as entities and to persons acting "under color of state law." Surely, then, it is erroneous to suppose—as did the lower courts—that it may be presumed that Congress, when it manifests an intention fully to implement a constitutional provision which has two objects, does not intend to reach the primary object of that provision unless it

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[12] The Court further indicated that "the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, *provided against all and every such possible contingency.* Thus the completeness of the Amendment in this regard, but the complement of *its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed*" (emphasis added). 227 U.S. at 288.

specifically says so. Rather the presumption should be that, in fully implementing a provision reading "The right * * * to vote * * * shall not be denied * * * by any State * * *," Congress intended to make the implementing legislation applicable to the States.[13]

B. THE LANGUAGE OF THE STATUTE INDICATES THAT CONGRESS INTENDED TO REACH THE STATES

Aside from any presumptions which may be involved (see also *infra*, pp. 35–40), the statute itself indicates the intention of Congress to provide a remedy against discriminatory action by the States.

First, subsection (a), which was originally enacted in 1870, is itself declaratory of that Amendment. It provides that citizens of the United States otherwise qualified to vote shall be entitled to vote without distinction of race, color, or previous condition of servitude. For this reason, several members of Congress, during the 1870 debates on the original statute, felt that this provision was unnecessary because it merely restated the Fifteenth Amendment. See remarks of Senator Thurman of Ohio, 91 Cong. Globe 3485, and of Representative Kerr of Indiana, 92 Cong. Globe 3872. Moreover, the final clause of subsection (a), following the declaration of the right, provides that

[13] Other civil rights legislation, giving a right of action to private persons, cannot be construed to authorize suits against a State for the obvious reason that sovereign immunity and the Eleventh Amendment present insuperable obstacles to any other result. See *Peay* v. *Cox*, 190 F. 2d 123 (C.A. 5); *Cook* v. *Davis*, 178 F. 2d 595 (C.A .5); cf. *Tenney* v. *Brandhove*, 341 U.S. 367; *Peckham* v. *Scanlon*, 241 F. 2d 761 (C.A. 7).

the right is secure, any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." This clause clearly suggests a purpose to implement the Fifteenth Amendment to the fullest extent, for it secures the right (1) against any custom, law or usage of the State itself, and (2) against any official acting "by or under [the State's] authority." Since subsection (c) of the Civil Rights Act of 1957, by its terms, was enacted as an enforcement provision for subsection (a), it must be assumed, at least in the absence of strong contrary evidence, that it was intended to enforce subsection (a) in its entirety—particularly when subsection (a) was itself reenacted in the 1957 Act. Certainly, it cannot be assumed that Congress, by providing a remedy for subsection (a), intended *sub silentio,* either to amend subsection (a) in order to narrow its application or to make the right guaranteed in subsection (a) secure only as against the action of particular officials, but not against the State itself.

Second, subsection (c), in providing for the enforcement of subsection (a), does not restrict the Attorney General's authority to seek preventive relief to "persons." It provides that "[w]henever any person * * * deprive[s] any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States * * * a civil action or other proper proceeding for preventive relief * * *." The authority to seek relief is therefore, by the terms of the statute, not confined to "persons." Unlike, for example, 42 U.S.C. 1983, which provides that every person who

deprives another person of rights shall be liable to the party injured, under 1971(c) the person's wrongdoing merely affords the occasion for the suit. Thus, the language of subsection (c) allows the Attorney General, on the basis of deprivations of voting rights by "persons" acting in the name of the State, to bring an injunctive action against the State itself, the judgment in which would be binding upon the persons committing the deprivation as well as all other persons acting for the State—that is, its "officers, agents, servants, employees, and attorneys." Rule 65(d), Fed. R. Civ. P. This is the only interpretation of subsection (c) which is fully consistent both with its language and with the intention of Congress to reach every situation within Congressional power under the Fifteenth Amendment.

C. LEGISLATIVE HISTORY

Even if the statutory reference to action or threatened action by "any person" were read into the provision authorizing preventive relief, the term "person," as used in this statute, should be taken to include a State. Only last Term the Court reiterated the rule to be applied as to whether a State is bound by federal statutory law. In *Sims* v. *United States,* 359 U.S. 108, 112, it was held that "whether the term person when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment * * *." And in *Plumbers' Union* v. *Door County,* 359 U.S. 354, 358, the Court stated that in determining whether a political body comes within the coverage of a statute the courts must seek to "effec-

tuate congressional policies * * *." Examined in the light of this standard, the legislative history of subsection (c) shows that Congress intended to authorize suits against a State.

1. Congress intended to prevent unlawful interference with the right to vote from any source

The legislative history of the Civil Rights Act of 1957 demonstrates a conscious and deliberate effort on the part of Congress to employ its powers fully to protect and secure the constitutional right of American citizens to vote.

In the House and Senate committee hearings, prominent witnesses, testifying both for and against the Act, clearly indicated their understanding that the proposal was a broad one which would comprehend actions against a State. Attorney General Brownell, speaking as the representative of the Executive, described the provisions in question "as machinery to enforce whatever the constitutional authority of the Federal Government may be in this area." Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., p. 25. And Attorney General Patterson of Mississippi, in opposing the bill, characterized it as giving the Attorney General of the United States the authority to secure "an injunction against the people of the whole State." He also observed that "such broad and sweeping authority conferred upon the Department of Justice * * * can be exercised and brought to bear upon the States of New York and California as well as upon the people of Mississippi and Georgia."

Hearings of Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess., p. 753. See also statement of Honorable Robert E. Jones of Alabama, *id.* at p. 796. Mr. Davis Grant, Assistant Attorney General of Texas, commented: "Thus you could have the State pitted against the Federal Government. This would most certainly result in a sharper conflict than an action against a private individual ever would." Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., p. 448.

Similarly, the House Judiciary Committee, where the Act originated, stated in identifying the power of Congress to act, that "the 15th Amendment denies the right *of any state* to abridge or deny the right to vote because of race, color, or previous condition of servitude" [emphasis added]. H. Rep. No. 291, 85th Cong., 1st Sess., pp. 6, 12–13. Subsequently, the Report explained how this power was exercised by the Act (*id.* at pp. 12–13):

> * * * The right of franchise must be protected by the sovereign if representative government is to be maintained. Therefore, the sovereign, acting within its constitutional jurisdiction, must preserve this fundamental and basic right *against any and all unlawful interference. That the proposal of this section does that very thing is clear.* Nothing contained in the proposal in any way infringes upon the power given to the States under the Constitution to fix the qualifications of the voters. It must be remembered that such power, however,

> is not unlimited, as indicated by the express power given to Congress to regulate the manner of conducting elections as well as by the 14th and 15th amendments, both of which expressly confer upon the Congress the power to enforce them by appropriate regulations. [Emphasis added.]

Throughout the debates there were repeated references to the fact that Congress was attempting to give full meaning to the prohibitions of the Fifteenth Amendment. Thus, Senator Bush, quoting in part from earlier remarks by Senator Bricker (103 Cong. Rec. 13138), stated:

> "The bill before the Senate deals with just one substantive right—the right to vote. It is the duty of the Congress to exert its *full power* under the 15th amendment to secure and protect that right." [Emphasis added.]
>
> * * * * *
>
> That is the central purpose of this bill: To give meaning to the 15th amendment of the Constitution of the United States.

See also remarks by Senator Purtell (103 Cong. Rec. 13328); Representative Celler, chairman of the House Judiciary Committee and a co-author of the bill (*id.* at p. 16088); and Representative Doyle (*id.* at p. 9390).

Indeed, the debate in Congress with respect to the reach of the Act centered, not on the application of the Act to a State—for that was generally assumed—but rather on the question of its applicability to private individuals. The exchanges concerning Part III of the bill between Senators Long, Cooper, and Javits

illustrate this point."[14] Senator Long contended that, while under Senator Cooper's view of the bill, the Attorney General could proceed only against "a State or against State authority or State board" (103 Cong. Rec. 12081), Attorney General Brownell apparently wanted authority under this section to bring suit on behalf of school boards to prevent private persons from interfering with the school board's decision to desegregate. This, to Senator Long, was not a "suit against a State" (*ibid.*), but rather one against private individuals. Senator Javits, a principal spokesman for the bill in the Senate, answered that individuals might also be proper parties to a suit, emphasizing that under the bill the jurisdiction of the court was occasioned by what the state agency did or should have done, and that such jurisdiction was "not affected by the persons who may be sued" thereunder. *Ibid.* Senator Cooper likewise stated that an individual might be a proper party if he attempted to block

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[14] Part III of the bill—which would have authorized the Attorney General to bring an injunction action when paragraphs 1, 2, and 3 of 42 U.S.C. 1985 were violated—was not enacted. The language, however, of Part III is identical in all respects relevant here to 1971(c):

> Whenever any persons have engaged or there are reasonable grounds to believe that any persons are about to engage in any acts or practices which would give rise to a cause of action pursuant to paragraphs First, Second, or Third, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceedings for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

an action properly begun to enforce a right, but that before the Attorney General could bring an action the State in some way must be denying the right. And he emphasized that (*id.* at p. 12082):

> It title III should become law, he [the Attorney General] could not file an action upon behalf of an individual or class of citizens unless the State—my State of Kentucky, the State of Louisiana, the State of New York, the State of Colorado, or any other State, or its officials acting under cover of law—were attempting to prevent a person from voting.

Senator Case of New Jersey agreed with Senator Cooper since the Fourteenth and Fifteenth Amendments apply only to activities of States and their subdivisions. *Ibid.*

In another portion of the debate, Senator Javits again stated (103 Cong. Rec. 12077):

> But obviously the gravamen of any proceeding under which the Attorney General is going to participate within any State will be the fact that the State has not done what it is supposed to have done under the State's own laws. Otherwise there is no measure of protection. * * *

The debates thus make it clear that there was no question of the binding applicability of the Act to a State; this was assumed by proponents and opponents alike. The only question was the extent to which private persons could or would be bound.

The contrary view of the district court was based on its conclusion that the "Civil Rights Act of 1957 was a compromise measure and the compromise reflected an

intention on the part of Congress to give limited authority—as opposed to full and complete authority—in this field" (R. 93). Of course, the Act was a "compromise." Few congressional enactments could not be so characterized. The areas of compromise, however, did not involve the issue here presented. On the contrary, the elimination from the bill of Part III (see *supra*, p. 28, note 14), involved only the issue of whether the Attorney General would be given power to seek preventive relief to protect rights other than voting, not whether there would be a limitation placed on his power in the voting field. The other major compromise, concerning the so-called jury trial amendment, involved only whether, after a judicial order had been obtained, a person violating that order would be entitled to trial by a jury in a criminal contempt proceeding. See 103 Cong. Rec. 16087–16088. But the authority contained in subsection (c) (Part IV of the Act) was at no time the subject matter of a compromise and, in the words of Representative Keating, one of the two authors of the bill, was left "intact." 103 Cong. Rec. 16087.

In short, the legislative history of the Act simply does not warrant the inference that the State is exempt. Throughout, it is clear that a principal assumption underlying the Act is the State's continuing responsibility for the wrongful conduct of its officials. Thus, the legislative history compels a conclusion that Congress never doubted that the States were bound by the Act to the extent that, under the Fifteenth Amendment, it could bind them.

2. Congress specifically intended to remedy situations resulting from the resignation of voting registrars

Congress was not merely concerned with the general proposition that the right to vote was to be protected against any and all interference which could be remedied under its Fifteenth Amendment powers, but it specifically considered the problem of voting rights in situations where local registration officials had resigned. Attorney General Brownell testified during the Senate committee hearing that the proposed bill would provide the only effective remedy for situations such as these existing in Macon County. Referring to the situation there, he stated that it was a shocking situation where "the voting rolls are frozen for the purpose of maintaining discrimination based on color." [15] Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., p. 79. The next day, in response to Senator Ervin's complaint that the bill completely nullified state administrative remedies, Mr. Brownell replied (*id.* at p. 189):

> I don't think that presents the right picture. You take for example the Tuskegee case that I gave yesterday. There they have not convened the election board for years, so that many of

[15] The particular reference was to a complaint received from Macon County, Alabama, which detailed that there was no registration board and that the state appointing agency had failed to fill the vacancies even though a petition had been made to the governor (who is a member of the appointing board). Senate Hearings, *op. cit. supra*, at pp. 78–79; see also *id.* at p. 205; Hearings of Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess., pp. 681, 1032.

> the eligible voters just can't get the board to convene to accept their registrations. There is a case where your State administrative remedies are for all purposes a dead letter and nobody would be interfering with them. They died of their own accord. This would give the only practical avenue that we can see for protecting the constitutional rights of the citizens there.

In the debate in the Senate, Senator Case of New Jersey detailed several methods employed by the States which had frustrated the existing remedies, among them the resignation of the local registrars. Alluding to the situation in Bullock County, Alabama, he presented to the Senate the facts involved in *Sellers* v. *Wilson*, 123 F. Supp. 917 (M.D. Ala.), where the court had found unconstitutional discrimination by local voting registrars, and had nevertheless granted no relief because the registrars had resigned (103 Cong. Rec. 13321–13322):

> Mr. President, this is the type of thing that we are talking about, stated in black and white in court decisions. It does not happen by accident that less than a quarter of the Negroes in the Southern States have the right to vote.
>
> Not only are the existing remedies proved to be inadequate by the facts, but the States in the South are trying to make the existing remedies even harder to be availed of by the passage of barratry statutes, under which no person without a direct personal interest in a suit may in any way assist a plaintiff attempting to secure his legal rights to vote.

* * * * *

> The remedy, already inadequate, is being made more so by the very people who oppose this mild, moderate, and reasonable bill. Mr. President, the additional remedy provided by this proposed legislation is absolutely essential.
>
> * * * * *
>
> The 15th amendment provides that Congress may provide by appropriate legislation for the enforcement of the voting rights of citizens, under that amendment. And, as the Senator from Ohio [Mr. Bricker] so well pointed out the other day, the power of Congress in this regard is plenary.

Near the end of the debate in the Senate, Senator Javits cited the situation existing in Macon County, Alabama, as one which particularly needed remedying by enactment of the bill. He cited that for an extended period there was then—as now—no functioning registration board in Macon County (103 Cong. Rec. 13732):

> There is and has been a major denial of both voting rights and jury service to Negroes in Southern States, particularly in the Deep South, and I am convinced it is going on right now. The controversy regarding the systematic denial of voting opportunities to Negroes residing around Tuskegee Institute coupled with the gerrymandering of the whole area, when at long last the white light of publicity threatened to get the Negroes the vote in Tuskegee, is itself current and strong proof of these assertions.
>
> On that subject, the press had an opportunity to interview two representatives from

that community, and they gave some very interesting and up-to-date figures. They showed that of some 14,530 Negroes in Macon County, 21 years of age or over, in 1950, only about 1,100 are registered, and they gave the following figures to buttress their position for the years 1951 to 1954, inclusive:

In 1951, 161 Negroes made application, and only 23 received certificates of registration.

In 1952, 225 Negroes made application, but only 52 received registration certificates.

In 1953, 182 Negroes made application, but only 28 received registration certificates.

In 1954, 456 made application, but only 167 received registration certificates.

During those 4 years, 1,024 made application to become voters, but only 270 of them were registered.

Then, Mr. President, we come upon an 18-month period when no one could register because there was no board of registry; that situation was allowed to continue during that time.

When we compare the registration of Negroes in that county with the registration of white persons, and the difficulty of registration by Negroes with the ease of registration by the white people, the contrast becomes all the more marked and the statements of fact become all the more confirmed, namely, that there is, and has been, in that area direct and outright discrimination on grounds of color in affording voting rights in Macon County, Ala.

The legislative history thus shows that the Act not only had a broad remedial purpose, but that it

was specifically considered flexible and comprehensive enough by Congress to cover the particular situation in Macon County. Certainly, the Act cannot reasonably be construed so narrowly as to exclude remedying the disenfranchisement of a large segment of a county's citizenry by a method which was specifically called to the attention of Congress as one of the evils which the Act was designed to correct.

D. THE STATUTE IS REMEDIAL

Even if it be assumed, *arguendo,* that the Congress did not wholly make clear its intention to include the States within the scope of the Civil Rights Act of 1957, that result would still follow from the obvious remedial purpose of the statute. The Act seeks to remedy interference with and deprivation of a basic constitutional right—the right to vote. It is well established that remedial statutes of that type are to be interpreted liberally and that, in the event that an ambiguity exists, they are to be read to include the sovereign.

The rules which have aided the courts in determining the applicability of statutes to the sovereign are deeply rooted in the common law. *Lord Berkley's Case* (1562), where the question involved the binding applicability of the statute *de donis conditionalibus* to the king, appears to be the earliest crystallization of the rule. Plowden's Reports, p. 223, 75 Eng. Rep. 339. While the court was split as to the proper rule to be applied, the king was held to be bound by the statute. Weston, J., stated that the statute did

not bind the king for he was not expressly named; Anthony Brown, J. held that the king's prerogative did not allow him to do injury to another and that, even assuming that the rule announced by Weston, J. applied, the king was sufficiently named; and Dyer, C. J., held that the king was bound though not named since the king is exempt from a statute which prevents abuses and wrongs only if it is shown that the lawmakers intended to permit the king to violate the intent of the statute. The view of the Chief Justice was subsequently followed in the *Magdalen College Case* (1616), Coke, Part XI, p. 66b, 77 Eng. Rep. 1235, and it found eloquent acceptance in the House of Lords in *The Case of Ecclesiastical Persons* (1602), Coke, Part V, p. 14a, 14b, 77 Eng. Rep. 69:

> In divers cases the King is (b) bound by act of parliament, although he be not named in it, nor bound by express words (A). And therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King although he be not named; for religion, justice, and truth are the sure supporters of the crowns and diadems of kings. * * *

Thus, Bacon's *Abridgment of the Law* summarizes the rule as follows: [16]

> * * * where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong,

[16] Bacon's *Abridgment of the Law, Prerogatives* (Bouvier ed., 1852), p. 92.

> the king shall be bound by such act, though not particularly named therein.
>
> But where a statute is general, and thereby (a) any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, (b) unless the statute is made by express word to extend to him.

The English rule in both its aspects was incorporated into the American system of jurisprudence. Bacon's statement of the common-law rule was cited with approval by this Court in *United States* v. *Knight*, 14 Pet. 301, 315, and *United States* v. *Herron*, 20 Wall. 251, 255. See also *People* v. *Herkimer*, 4 Cowen 345 (N.Y.). More recently in *Nardone* v. *United States*, 302 U.S. 379, 384, the Court again held that it is a "well recognized principle * * * that the sovereign is embraced by general words of a statute intended to prevent injury and wrong." See *Sims* v. *United States*, 359 U.S. 108; *California* v. *United States*, 320 U.S. 577; *United States* v. *California*, 297 U.S. 175; *United States* v. *Rice*, 327 U.S. 742; *Ohio* v. *Helvering*, 292 U.S. 360.

This Court has also established general standards with respect to the problem of the construction of remedial statutes, which are fully applicable to the issue here. In *Stewart* v. *Kahn*, 11 Wall. 493, 504, the Court stated that if "[t]he statute is a remedial one * * * [it] should be construed liberally to carry out the wise and salutary purposes of its enactment." Similarly, in *Phillips Co.* v. *Walling*, 324 U.S. 490,

493, it was emphasized, in the context of the Fair Labor Standards Act, that:

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

The court of appeals apparently relied on the second portion of Bacon's rule (*supra*, p. 37) —that a a statute which deprives the king of any prerogative, right, title or interest applies to him only if the statute expressly so provides. While the concept of royal prerogatives was naturally discarded in the United States, the exemption was retained with respect to the sovereign's role of *parens patriae* as protector of the public interest. See *United States* v. *Knight, supra,* 14 Pet. 301; *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *Stanley* v. *Schwalby,* 147 U.S. 508; *Commonwealth* v. *Baldwin,* 1 Watts 54 (Pa.); *People* v. *Herkimer, supra,* 4 Cowen 345 (N.Y.). Any right, title, or interest which a State or the United States might hold as trustee for the people is presumed not to be divested by general words in a statute unless the sovereign is explicitly named or the statute carries an unavoidable implication to that effect. But to construe

the statute involved here as binding the State divests it of no interest which it holds as trustee for the people. Certainly, at least since the passage of the Fifteenth Amendment, the State has had no right or legitimate power to discriminate in voting on the basis of race or color.[17]

The statute involved here was obviously intended to have a broad remedial purpose. Thus, it calls for interpretation consistent with the standards laid down by this Court requiring that such statutes include the sovereign within their general language and that they be liberally construed. In fact, it is difficult to imagine a more cogent case in which such a construction is demanded since the substantive right to be protected is not merely one conferred by Congress, but is a basic democratic right guaranteed by the Constitution itself. See *Ex parte Yarbrough,* 110 U.S. 651, 665.

Interpreting subsection (c) to allow the Attorney General to bring actions against the State would clearly effectuate the broadly remedial provisions of the statute. An injunction against the State would bind all state officials affected thereby. Moreover, while the State is a proper party within both the language and remedial purpose of subsection (c), we submit that in the instant case

[17] Moreover, the States have never had a right to assert any sovereign immunity in a suit brought by the United States. See *supra*, p. 18.

the State is, in fact, a necessary and essential party for the effectuation of the Act. Unless the Attorney General can bring an action under subsection (c) against the State—which, in fact, bears responsibility for the discrimination charged—the purpose of the Act will be totally defeated by the simple expedient of the resignation of voting registrars and the refusal of state officials to appoint replacements.[18]

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[18] If, as we contend, the district court had jurisdiction to entertain the injunction action involved here, the court had the usual broad powers of equity to carry out its decree. Not only would the injunction be binding on any registrars appointed in the future under Rule 65(d), but, we submit, the court has power to require the State, through appropriate officers and agents, to enforce its voting laws consistent with the Constitution. Cf. *Ex parte Peterson*, 253 U.S. 300, 312:

> Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. * * *

See also *Porter* v. *Warner Co.*, 328 U.S. 395; *Dupont* v. *Dupont*, 242 Fed. 98, 137–138 (D. Del.); *Bartlett v. Gates*, 118 Fed 66, 71–72 (D. Colo.); *English* v. *Cunningham*, 269 F. 2d 517 (C.A D.C.), certiorari denied, 361 U.S. 897, 905.

II

THE INDIVIDUAL DEFENDANTS WERE PROPER PARTIES IN THIS ACTION

Whether or not the State is a proper defendant in an injunction action brought under Section 1971(*c*), we submit that the action was properly brought against the individual defendants. The district court and the court of appeals held, however, without relying on any decisions of the Alabama courts, that under the Alabama statutes the resignations tendered by the registrars had become effective and that therefore they were not proper parties to this action (R. 83–87, 107). Since this Court has frequently held that, save in exceptional circumstances, it will not review questions of state law which have been determined by the lower federal courts in the area (see, *e.g.*, *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 529–530; *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530, 534; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237), we will assume, *arguendo*, for purposes of this case, the correctness of this ruling as to state law. Nevertheless, we submit that the resignations do not require the conclusion, under federal law, that the individual defendants could not properly be named as parties defendant in order to give effect to the rights secured by the Civil Rights Act.

A. EVEN IF THE REGISTRARS' RESIGNATIONS WERE NOT TENDERED IN BAD FAITH, THAT DID NOT PRECLUDE THE REGISTRARS FROM BEING NAMED AS PARTIES DEFENDANT IN SUITS UNDER THE CIVIL RIGHTS ACT OF 1957

We submit that the remedial purpose of the Act, and the broad powers conferred on the Attorney General

in subsection (c) to secure preventive relief, justify bringing an action against registrars who have themselves deprived citizens of the right to vote in violation of the Act and the Fifteenth Amendment, even though they have submitted resignations effective under state law, when the State has failed to appoint new registrars to take their place. Certainly, the important purposes of the Act cannot be defeated by the simple resignations of the registrars and the refusal of appropriate state officials to appoint new registrars—even assuming that such action was not taken in bad faith. In such a situation, the federal courts have ample power to effectuate the purposes of the Act by considering the resignations as ineffective for the limited purpose of holding the registrars as proper defendants under subsection (c), if the Act is construed, as it must be, to provide not only a right but an effective remedy.[19]

1. Federal law controls

It is, of course, well-established law that when, as here, the jurisdiction of the district court rests upon a federal substantive statute, the issues must ordinarily be determined by reference to federal law.[20] See, *e.g.*, *Dei-*

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[19] We assume, *arguendo*, in light of the holding of the courts below, that the individual defendants have no authority to act as registrars under state law. It does not follow, however, that authority to act may not be granted them by the court under its general equitable powers for the purpose of carrying out its decree. See *supra*, p. 40, note 18.

[20] The complaint (see R. 1) alleged that the district court had jurisdiction under the Civil Rights Act of 1957 (42 U.S.C. 1971(d)), which specifically confers jurisdiction on the federal courts in actions under the Act, and in addition, because of the

trick v. *Greaney*, 309 U.S. 190, 200; *D'Oench, Duhme & Co.* v. *F.D.I.C.*, 315 U.S. 447, 455–456. As Mr. Chief Justice Stone declared for this Court in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176:[21]

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins* * * *. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. * * *

In *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395, the Court stressed the necessity of applying federal law where the remedy for the federally created right is in equity:

> The present case concerns not only a federally-created right but a federal right for which the

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fact that the United States instituted suit (28 U.S.C. 1345). This Court has similarly held that federal law will also be applied, normally, where the federal court's jurisdiction is invoked by the initiation of the action by the United States, *Board of Commissioners* v. *United States*, 308 U.S. 343; *Clearfield Trust Co.* v. *United States*, 318 U.S. 363.

[21] Although *Sola* was a diversity case, the issues were so dominated by the policy of the Sherman Act that the Court applied federal law derived from that policy. 317 U.S. at 176.

> sole remedy is in equity. * * * We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. * * *. [Citations omitted.] [22]

Applying these principles to the present case, it is clear that if the resignation of the registrars were controlled exclusively by state law, the policy of the federal statute would be set at naught and its benefits denied. Similarly, unless the law governing the effectiveness of resignations of state registrars is uniform insofar as their federal duties are concerned, a registrar in one state, who has illegally deprived other citizens of the right to vote, will be required, despite his purported resignation, to place such citizens on the

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[22] The question here must be distinguished from "capacity to be sued," and hence must be resolved without regard to Rule 17(b), Fed. R. Civ. P., under which the *capacity* of an officer of a state is determinable by the law of the state in which the district court is held. 3 Moore, *Federal Practice* (2d ed.) § 17.19. It is not disputed that Alabama state officers as such, including registrars, are suable. The issue here, rather, is whether the individual defendants should be considered state officers for purposes of determining whether they are subject to suit under the Act. Rule 17(b), furthermore, has been held inapplicable to non-diversity cases in which suit is based upon a federal statute. *Briggs* v. *Pennsylvania R. Co.*, 153 F. 2d 841, 842 (C.A. 2) (L. Hand, J.); *McCollum* v. *Mayfield*, 130 F. Supp. 112, 117 (N.D. Cal.); cf. *Roberts* v. *U.S. District Court*, 339 U.S. 844, 845.

registration rolls, while in another state a registrar under the same circumstances may avoid any responsibility for redressing the wrongs he has committed. It is clear that Congress could not have intended the effectiveness of its remedial statute to be dependent upon the accidents, or designs, of state law. Cf. *National Law Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124.

2. The appropriate federal rule

In choosing the proper federal rule to be applied in cases involving a federal statute, it is true that this Court has "occasionally selected state law." See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367; *Royal Indemnity Co.* v. *United States*, 313 U.S. 289. But where a uniform rule has been considered desirable in effectuating the federal purpose, the Court has disregarded state law (*Clearfield Trust Co.* v. *United States, supra; Deitrick* v. *Greaney, supra; D'Oench, Duhme & Co.* v. *F.D.I.C., supra*), particularly where the remedy for the federally-created right is in equity. *Holmberg* v. *Armbrecht, supra.* The rejection of state law does not result in a vacuum. The courts may not only "draw upon all the sources of the common law * * *," but may also resort to the Constitution, federal statutes, and their underlying policies. *D'Oench, Duhme & Co.* v. *F.D.I.C., supra*, 315 U.S. at 472 (Mr. Justice Jackson, concurring).

At common law, the acceptance of a public office was required, and a refusal to assume it was a crime. *Edwards* v. *United States*, 103 U.S. 471, 473; *The King* v. *Larwood*, 4 Mod. 270; *Rex* v. *Bower*, 1 Barn.

& Cres. 585; *State* v. *Ferguson,* 31 N.J.L. 107, 120. It followed as a corollary that an appointee, after assuming an office, could not resign without the consent of the appointing power. For a resignation to be complete, the consent of the appointing authority had to be manifested by an acceptance, either expressly by entry in the public books or impliedly by appointment of a successor. *Edwards* v. *United States, supra,* 103 U.S. at 474; Willcock, *Corporations,* p. 239.

Standing alone, however, the common-law rule is inadequate to govern resolution of the federal question involved here.[23] That rule was formulated to govern the relationship between an officeholder and a single sovereign. The responsibilities of the officeholder were owed exclusively to the public whose representatives had appointed him. It was reasonable to assume that such representatives, being responsible to the public, would not accept the officeholder's resignation if the public convenience would suffer thereby. No such assumption can be indulged where, as here, the officeholder's responsibility is not merely to the public whose representatives have appointed him, but

[23] If the common-law rule were applied to the facts of this case, the resignations of the individual defendants would be ineffective. Here, the record is barren of competent evidence of duly authorized acceptance. Nor were the resignations accepted by implication, since no successors have been appointed. Self-serving affidavits of the defendants assert that their resignations were "accepted" (R. 34, 36), but do not state *when* the alleged acceptances occurred, *i.e.*, whether before or after commencement of this suit, or *how* they occurred; thus, there is no evidence that the alleged acceptances were manifested by entry in the public books as required at common law.

also to a superior sovereign. The power to decide whether acceptance of the resignation will leave unprotected the interest of the superior sovereign cannot safely be entrusted to the appointing authority, which is not accountable to the nation in whose citizens the superior sovereignty resides.

Here, the registrars owe a duty not only to Alabama, but also to the United States. The basic source of the federal duty lies in the Constitution. The Fourteenth and Fifteenth Amendments, respectively, impose upon state officials a duty (1) not to deny to any person within the jurisdiction of the State the equal protection of the law, and (2) not to deny or abridge the right of citizens of the United States to vote on account of race, color, or previous condition of servitude. The latter duty under the Fifteenth Amendment is implemented by subsection (a) of the Civil Rights Act which the Attorney General is attempting to enforce in the action involved here. Furthermore, in guaranteeing to qualified voters within a state the right to cast their ballots and have them counted in congressional elections (*United States* v. *Classic*, 313 U.S. 299, 314, 315; *Wiley* v. *Sinkler*, 179 U.S. 58, 62; *Ex parte Yarbrough*, 110 U.S. 651, 663), the Constitution imposes upon state voting officials a duty not to deny or abridge the right. These duties, moreover, were explicitly assumed by the registrars when they subscribed, prior to taking office, to the oath required of them by the United States Constitution (Article VI, Clause 3), by Act of Congress (4 U.S.C. 101), and by the Alabama Constitution of 1901 (Art. 16, Sec. 279; see 17 Ala. Code 25).

The federal duty of voting registrars, notwithstanding their appointment by the State, is accompanied by a federal *status*. This Court has held that a state official may be so invested with a federal duty as to become a federal official for federal purposes. When a federal prisoner is placed in the custody of a state keeper, such keeper becomes, so far as the detention and treatment of that prisoner is concerned, a "keeper of the United States." *Randolph* v. *Donaldson*, 9 Cranch 75, 86; see also *Wilson* v. *United States*, 26 F. 2d 215, 216 (C.A. 8); *In re Morgan*, 80 F. Supp. 810, 817 (N.D. Iowa); *Ex parte Shores*, 195 Fed. 627, 630 (N.D. Iowa). Thus, at least with respect to federal elections, voting registrars act as agents of the United States, as well as of the State.

3. The rule to be applied here

Given the clear federal duty of the registrars to register qualified citizens for voting in federal and state elections without distinction of race or color, and the clear policy of the Civil Rights Act to hold responsible those officials who default in the performance of that duty, the resignations of the individual defendants should be considered as ineffective, under federal law, for purposes of determining their amenability to suit here. We urge that, for purposes of actions by the United States under the Civil Rights Act, the resignation of a state registrar alleged to have violated the Act is effective only upon the qualification of a successor. This rule is both reasonable and supported by precedent. It is the rule favored by this Court and

other federal courts in construing state statutes in diversity cases not involving a federal interest. Thus, in *Badger* v. *United States ex rel. Bolles*, 93 U.S. 599, this Court held, in a diversity case, that a writ of mandamus could be issued to city officials who prior to the filing of the petition for mandamus had purported to resign, as they had a right to do under local law, and whose resignations had been duly accepted in accordance with local law (*id.* at pp. 603, 601). This Court, however, in construing an apparently conflicting local statute which provided that the officials "shall hold their offices until their successors shall be qualified", held (93 U.S. 599, 602, 603):

> The resignations may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact; to wit, the appointment of a successor, and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor.

In so construing the local statutes, the Court made clear that it was strongly influenced by a disposition to avoid a construction which would allow a hiatus in public office. *Id.* at pp. 604-605. Accord, *United States* v. *Green*, 53 Fed. 769 (W.D. Mo.); *United States ex rel. Watts* v. *Justices of Lauderdale County*, 10 Fed. 460, 466 (W.D. Tenn.).

We submit that the same consideration, coupled with the necessity of effectuating the vital federal policy expressed by the Civil Rights Act, requires adoption of the same rule here. It would frustrate the high purposes of the Civil Rights Act of 1957 to construe it as declaring a right but allowing violation of such right to go remediless. Where state registrars are alleged to have violated the Act, have resigned from office, and successors have not been appointed, it is entirely reasonable and consistent with the general principles of law discussed above, as well as the specific objectives of the Civil Rights Act, to hold that these registrars may nonetheless be named as parties defendant in order that the court may carry out the statutory mandate by providing effective relief. The precise manner in which such relief may be granted may vary with the necessities of particular cases; but certainly there is no lack of power in the federal courts to take such action as circumstances may require in order to give full effect to the rights involved.

B. THE REGISTRARS' RESIGNATIONS WERE CLEARLY INEFFECTIVE BECAUSE THEY WERE MADE IN BAD FAITH TO AVOID THEIR CONSTITUTIONAL DUTY OF REGISTERING VOTERS WITHOUT RACIAL DISCRIMINATION

If, despite our earlier contentions to the contrary, the Court should determine that qualification of a successor is not generally necessary to make a registrar's resignation ineffective for purposes of amenability to suit under the Civil Rights Act, the resignations in the instant case were nevertheless ineffective for purposes of that Act. The complaint in the instant case

alleged that the resignations had been submitted in bad faith, and these allegations, for purposes of the motion to dismiss, must be considered as proven. Such resignations submitted for the purpose of frustrating the enforcement of the Fifteenth Amendment and the Civil Rights Act should not prevent the registrars from being considered proper defendants in suits under that Act.

We have shown above (pp. 42–45) that federal law is applicable in cases, such as this one, brought under a federal statute, and that this law, in the absence of applicable federal constitutional and statutory provisions or policy, depends largely on common law. At common law, it was recognized that an attempted resignation by a public official, even though accepted, is not effective where it is submitted in order to avoid the performance of a specific and obligatory duty or merely to thwart litigation. See *Badger* v. *United States ex rel. Bolles, supra,* 93 U.S. at 604–605; *Thompson* v. *United States,* 103 U.S. 480, 482; *Edwards* v. *United States,* 103 U.S. 471, 473; *United States* v. *Green, supra,* 53 Fed. 769; *United States ex rel. Watts* v. *Justices of Lauderdale County, supra,* 10 Fed. 460; *People* v. *Keating,* 112 Colo. 26, 30–31, 144 P. 2d 992, 994; *People* v. *Barrett,* 365 Ill. 73, 82, 5 N.E. 2d 453. In *Keating,* the Colorado Supreme Court clearly stated the common-law rule and its rationale (112 Colo. at 30-31, 144 P. 2d at 994):

> The right of any public official to resign cannot be doubted; but when the resignation is * * * to avoid performing a specific duty

> in the interest of a party in whose behalf such official is legally bound to act, his resignation, however formally tendered and accepted, will be regarded as without effect. Otherwise, public officials, persistently and successively resigning their offices, could work the undoing of parties whose rights are dependent upon action by those officials. The law may not thus be mocked, nor will ministers of justice, to whom appeal is made for relief in such situations, fail to grant relief * * *.[24]

Accordingly, evidence of the motive of the official in attempting to resign is admissible to attack the effectiveness of the resignation. See *Thompson* v. *United States, supra,* 103 U.S. at 482–483; cf. *Edwards* v. *United States, supra,* 103 U.S. at 473.

The wisdom of the common-law rule is plain. 'In nullifying a resignation prompted by an intent to avoid the performance of a legal obligation, it is designed to hold public officials accountable for their actions. Similarly, the rule is fully consistent with

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[24] This rule follows logically from the broader principle that equity will not perpetuate a fraud. Thus, an officer of a corporation cannot avoid service of process upon him as a representative of the corporation by purporting to resign, even where the "resignation" is accepted. *Inventions Corp.* v. *Hobbs*, 244 Fed. 430 (C.A. 2); *Evarts* v. *Killingworth Mfg. Co.*, 20 Conn. 447, 457; see *Carnaghan* v. *Exporters' &c. Oil Co.*, 11 N.Y.S. 172, 175; cf. *Zeltner* v. *Zeltner Brewing Co.*, 174 N.Y. 247, 252–253, 66 N.E. 810; 2 Fletcher (1954 rev. vol.); *Cyclopedia Corporations*, § 345. The resignation of a corporate director is also ineffective if the interests of the corporation would thereby be left without proper care and protection. *Zeltner* v. *Zeltner Brewing Co., supra; Carnaghan* v. *Exporters' &c. Oil Co., supra;* 1 Morawetz, *Private Corporations* (2d ed., 1886), § 563.

federal law and policy, and its application is particularly imperative where the obligation sought to be avoided is one imposed by the Constitution.

In this case, the complaint alleged that the registrars had resigned for the purpose of avoiding their constitutional duty to register qualified Negroes (R. 4, 5):

> 12. *For the purpose of preventing Negroes from registering* the Registration Board did not perform its functions and duties for substantial periods of time. Such periods of time and such failure to perform its functions and duties have included the following:
>
> * * * * *
>
> (e) *From December 1958 to the present the Registration Board rendered itself inoperative by the purported resignation of its only two members.* [Emphasis added.][25]

This allegation of the complaint that the resignations of Livingston and Rogers were intended to prevent Negro registration was supplemented by the further allegations that, for the same reason, (1) the registration board (composed of Livingston, Rogers and one

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[25] As the complaint made clear, defendants Livingston and Rogers were the only members of the registration board as of December 1958 (R. 2, 5), and the purported resignations at that time were those of Livingston and Rogers (R. 3). And, as the district court found, "[i]t is the individuals on the Board, and not the Board itself, that conduct the registration; it is the individuals on the Board who may by their 'acts and practices' deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional obligation relative to registering qualified applicants of Macon County, Alabama, to vote" (R. 88).

other), had refused to convene from March 1957 to June 1957 (R. 4–5), and (2) previous members of the registration board had resigned or refused to convene (R. 4, 5).[26] See Report of the United States Commission on Civil Rights, 1959, pp. 75–76, regarding the technique of resignation by registrars as a device to thwart Negro registration and to frustrate federal investigation or action.

The individual defendants filed a motion to dismiss the complaint (R. 46) and affidavits stating that their resignations had been tendered in "good faith" (R. 33, 35).[27] The district court, apparently accepting

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[26] The complaint also asked the district court to enjoin the individual defendants from "[f]ailing and refusing, on the grounds of race or color, to convene and function as a board of registrars * * *" (R. 8).

[27] Both affidavits contained the following identical language (R. 34, 35–36):

> Deponent further states that on December 10, 1958, he resigned as a member of the Board of Registrars of Macon County, absolutely and unconditionally, by written resignation delivered to the Appointing Board; that said resignation was in good faith and further that deponent does not intend to serve again as a member of the Board of Registrars; that said resignation has been accepted by the Appointing Board; that additionally the Appointing Board has notified him that he has been removed therefrom; that deponent has accepted, qualified and begun serving in another public office for profit, which of itself automatically vacates any prior office, viz., that of member of the Board of Registrars of Macon County, Alabama; that at the time this suit was filed and at the time of the service of process, deponent was not acting in any representative capacity for said Board of Registrars; was not a member thereof and had no authority or connection whatever with said Board of Registrars.

The assertions of the defendants that they did not intend again to serve as registrars and that they have assumed other

these affidavits as conclusive, found that the resignations were, in fact, tendered in "good faith" (R. 87) and therefore dismissed the complaint against the individual defendants (R. 94).[28]

The district court's determination, we submit, was clearly erroneous. A complaint may not be dismissed without giving the plaintiff an opportunity to offer evidence supporting his allegations "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45–46; see, *e.g.*, *United States* v. *The White County Bridge Commission*, C.A. 7, decided January 11, 1960; *Seymour*

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public offices do not contradict the allegation of the complaint that their purpose in resigning was to prevent Negro registration. Moreover, the registrars, by stating in their affidavits that they had both resigned on the very same day (December 10, 1958), cast serious doubt upon the truth of their assertions that they had resigned in "good faith". Any contention that the simultaneous tender of the resignations was coincidental stretches credulity, especially since, as the district court stated, the "resignations were submitted during a controversy between the Commission on Civil Rights and certain Alabama officials, including Livingston and Rogers, over the right of said Commission to inspect and copy some of the same records the plaintiff in this case now seeks" (R. 82).

[28] The court suggested that its disposition would have been different had it concluded that the resignations were tendered in bad faith (R. 87):

> Nothing stated in this opinion should be construed to mean that this Court sanctions or will sanction the proposition (here unnecessarily advanced by Livingston and Rogers) that registrars are free to resign at will, indiscriminately and in bad faith, and thereby cast off all of their responsibilities and obligations as such officers.

In so stating, the court implicitly recognized the force of the common-law rule nullifying the effect of resignations tendered by public officials for the purpose of avoiding their legal obligations.

v. *Union News Company,* 217 F. 2d 168 (C.A. 7). For purposes of a motion to dismiss, the material allegations of the complaint must be taken as admitted. See, *e.g., Clark* v. *Uebersee Finanz-Korporation, A.G.,* 332 U.S. 480; 2 Moore *Federal Practice* (2d ed.), § 12.08. Nor can a district court properly dismiss a complaint on the basis of assertions in the affidavits filed in support of the motion to dismiss. "An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint." *Frederick Hart & Co.* v. *Recordgraph Corp.,* 169 F. 2d 580, 581 (C.A. 3); see, *e.g., Sartor* v. *Arkansas Gas Corp.,* 321 U.S. 620; *Farrall* v. *District of Columbia Amateur Athletic Union,* 153 F. 2d 647 (C.A.D.C.); 2 Moore, *Federal Practice* (2d ed.), § 12.09.

Since the allegations of the complaint must be accepted as true for purposes of the motion to dismiss, it is clear that the district court erred in dismissing the complaint against the registrars. The allegations of the complaint filed in this case stated a claim which, if proven, would have established not only that the attempted resignations themselves constituted discriminatory practices proscribed by the Fifteenth Amendment and the Civil Rights Act of 1957, but would have nullified the effect of the resignations for purposes of this suit.[29]

[29] Since the district court erred in finding good faith, its determination, based on that finding, that the resignations were effective under state law is likewise erroneous. The court did not expressly consider whether the resignations would have been effective under state law if made in bad faith, although it suggested the contrary. See *supra*, p. 55, note 28.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

NO. 398

UNITED STATES OF AMERICA, Appellant

vs.

STATE OF ALABAMA, et al., Appellees

BRIEF AND ARGUMENT OF APPELLEES

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Middle District of Alabama was adverse to appellant, the United States; that opinion is reported at 171 Fed. Supp. 720 (R. 79-94). The appellant appealed therefrom to the Court of Appeals. The opinion of the Court of Appeals was also adverse to appellant. That opinion is reported at 267 F. 2d 808 (R. 101-108).

STATEMENT OF THE CASE

The case is succinctly stated by the pleadings and is sufficiently summarized in the opinions here being reviewed.

However, with the exception of the few additions here noted, appellees accept the general statement of the case as set out by appellant. Appellant's statement should be clarified to show or to include the following:

Neither the Trial Court nor the Circuit Court of Appeals found it necessary to consider the constitutionality of the Civil Rights Act (R. 92).

Defendants Rogers and Livingston resigned and gave written notices of their resignations to the appointing authorities *approximately two months before this case was filed.* The lower courts found as a question of mixed fact and local law that the resignations were absolute and unconditional and that they were made in good faith. It was shown that neither intends to serve again as a member of the Board of Registrars; that their resignations were accepted by the appointing board; and that both hold other public offices, each having qualified and begun serving in his new public office which of itself, ipso facto, and as a matter of Alabama law, vacates the first office. (R. 33 and 35; see also the Opinion of the Trial Court, particularly at R. 81-82 and 87 and the Opinion of the Court of Appeals, particularly at R. 102 and 107.)

At page 13 of appellant's brief, the statement is made: ". . . the complaint alleged that the individual defendant's purported resignations were made in bad faith for the purpose of avoiding their constitutional duty to register qualified Negroes" and that "The District Court, on the basis of affidavits submitted by defendants, found that their purported resignations were made in good faith." No such allegation of "bad faith" can be found in the complaint (R. 1-12); and, although appellant submitted affidavits and other evidence by way of deposition, not the slightest indication of "bad faith" was shown. On the contrary, on the matter of "bad faith" of the resignations, the controversy between the Civil Rights Commission and certain Alabama officials referred to in appellant's Statement of Facts at page 8 of appellant's brief occurred

long after Respondent Roger's intention to resign was made manifest, for Rogers ran for election and was elected State Representative in the May 1958 Primary election, while the controversy referred to occurred in December 1958 and January 1959 (R. 61 and 82).

At page 7 of the appellant's brief, it is stated that the amended complaint avers that the State of Alabama, through its agents, officials, and agencies, had engaged in discriminatory and unlawful practices. Attention is called to further allegations of the complaint which set out certain applicable laws of the State of Alabama specifically (R. 9). (These and other applicable State laws are, of course, within the judicial knowledge of the Court.) The Alabama law specifically forbids discrimination between applicants for voting. See Section 31 of Title 17, Code of Alabama 1940, referred to in the complaint at Appendix A to the complaint (R. 9-12). The complaint shows on its face by this specific allegation that if there be any discrimination against any applicant for registration, such discrimination is unauthorized under the laws of the State of Alabama and is completely ultra vires, being merely the individual action of some person or officer and not the act of the State; such action as complained of cannot be the action of an agent acting within the line and scope of his authority for and on behalf of the State of Alabama.

In appellant's brief, pages 14 to 18, there appears a further statement by way of "Introduction", which appears to be quoted from "The Report of the Commission on Civil Rights, 1959", and is completely outside the Record of this case.

QUESTIONS PRESENTED

The appellant (appellant's brief, page 2) presents two questions as being properly raised in this cause. Appellees respectfully insist that the questions are more properly expressed by the changes indicated and by the addition of the underscored phrases. We submit that, when the legal questions involved are thus properly posed, the answer to them becomes self-evident. (Changes from the Government's wording of the questions are indicated by placing the word to be deleted in parenthesis and italicizing the words to be added.)

1. Whether the Civil Rights Act of 1957 authorizes the United States to secure (equitable) "*preventive*" relief against a state in order to remove discriminations against Negro citizens unconstitutionally denied the right to vote *by the alleged illegal action of certain state voting registrars acting under the color of their office.*

2. Whether, in order to secure the federal voting rights guaranteed by the Constitution and the Civil Rights Act of 1957, voting registrars alleged to have violated such rights may be named as parties defendant where they have (purportedly) resigned from office and their successors have not been appointed *in an injunctive proceeding to prevent future discrimination.*

As to the first question: It is obvious that "preventive relief:" (to use the precise words of the Civil Rights Statute instead of the general words "equitable relief" employed by appellant) can be adequately secured against the wrongdoing individuals; indeed, the injunction can be directed with more certainty against the particular wrongdoers than generally against a governmental body as large as a state sovereignty.

As to the second question: What purpose is there for attempting to secure preventive relief to prevent future discrimination against an alleged wrongdoer who is no longer in a position to commit the wrongs complained of?

SUMMARY OF ARGUMENT

INTRODUCTION

The appellee raised as one of the various grounds of dismissal the contention that the Civil Rights Act was unconstitutional; however, the District Court disposed of the case without passing on the constitutional question. The Circuit Court of Appeals likewise found it unnecessary to consider the constitutionality of the statute.

The Argument of appellee is divided into three major sections:

I. Defendants Rogers and Livingston had effectively and completely resigned from the Board of Registrars of Macon County, Alabama, prior to the time suit was filed and had no connection with the Board of Registrars for any purpose at the time suit was filed.

II. An action under the Civil Rights Act must be against individual persons or officials, and the State of Alabama is not a proper party defendant in such an action.

III. Even if the Civil Rights Act authorizes an action against a state, the court should refrain from granting an injunction against the State of Alabama under the facts here existing.

The two carefully prepared opinions of the lower courts make the correctness of the judgement self-evident.

I

At the time this suit was instituted, Appellees Rogers and Livingston had no connection with the Board of Registrars of Macon County, Alabama. *Almost two months before*, on December 10, 1958, Rogers and Livingston resigned as members of the Board of Registrars and gave written notice of their unconditional resignation to the appointing authority. Under the established Alabama law, this is complete and effectual resignation. The resignation needs no acceptance, and indeed cannot be withdrawn, even with the consent of the appointing authority. *State ex rel. Williams v. Fitts*, 49 Ala. 402; *State ex rel. Almon v. Fowler*, 160 Ala. 186, 48 So. 985. The contention of appellant that Title 17, Section 22, of the Code of Alabama 1940, requires the registrars to hold office until their successors are appointed is based upon construing the word "may" in the statute to read "shall" or "must" and is without merit. The precise question has been passed upon by the Supreme Court of Alabama long before this case arose. *Cooper v. State*, 226 Ala. 288, 147 So. 432. In addition, the appointing authority notified Rogers and Livingston that they had been removed as members of the Board of Registrars, and as is provided in Title 17, Section 22, Code of Alabama 1940, supra, the appointing authority has the power to instantly and peremptorily remove any registrar, with or without cause.

Even if this were not sufficient, neither Rogers nor Livingston can be a member of the Board of Registrars for this further compelling reason: They had accepted and held another public office, and this, as a matter of law, automatically vacates the first office, ipso facto. No person shall hold two offices of profit at one time in this State. Intention or "good faith" in

that situation is not material. Section 280, Constitution of Alabama 1901; Title 41, Section 5(7), Code of Alabama 1940; *State ex rel. Camp v. Herzberg*, 224 Ala. 636, 141 So. 553.

These offices, or official positions, are created by State law, controlled by State law, and extinguished by State law. Therefore, neither Rogers nor Livingston held the office of member of the Board of Registrars at the time suit was instituted. Accordingly, it was proper that the Trial Court dismiss the case as to them.

II

The District Courts of the United States have jurisdiction of proceedings instituted under the Civil Rights Act as provided by that law. The wording of the Act conveys no authority for actions against states, and to interpolate such a provision into the law is completely unjustified. The specific point has been passed upon by the courts in a half-dozen cases; the clear and uniform rule is that the Civil Rights Act operates upon individual persons only and not upon the sources of their authority. There is not a single case to the contrary. Numerous cases holding that states are not proper parties defendant under the Civil Rights Act were decided before enactment of the 1957 Amendment. It can be presumed that Congress was aware of the uniform construction of the Act as to permissible parties defendant. The fact that Congress made no change of this feature of the Act is itself indicative of legislative intent.

There are numerous considerations which strengthen this conclusion. First, the appellant's contention to the contrary, the legislative history of the Act reveals no intention to authorize proceedings against a state, as such. The testimony before the committees indicates

an intention that the Act was to be used only against individual persons and shows that the Amendments contemplated no change of that part of the Act.

Nowhere in the Act are specific words which authorize suits against a state. The general rules of statutory construction exclude the government, whether federal or state, and its agencies, from the purview of such statutes in the absence of provisions clearly extending the statutes to them.

The courts should act cautiously before construing this or any other statute to empower the courts to control governmental functions of a state by injunction; the purpose of the law would be better served by actions against the offending individuals or public officials. The public official who denies any other person his constitutional rights is acting personally and not as an agent for the state, particularly so in this instance, where the State law itself expressly forbids any discrimination between applicants for registration. Congress recognized the doctrine alluded to above, and, by not specifically extending the Act to cover states, evidenced approval, or acceptance, thereof.

The Courts from the beginning of the Civil Rights cases have seen that such legislation must act upon persons, not upon the abstract thing denominated a state. This accomplishes all the legitimate purposes of the Acts and in nowise invades state sovereignty.

As the District Court in this case observed: "It is the individuals on the Board, and not the Board itself, that conduct the registration; it is the individuals on the Board who may by their 'acts and practices' deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional

obligation relative to registering qualified applicants of Macon County, Alabama, to vote." This same reasoning answers appellant's contention that a state can be, and should be, made a party defendant.

The Civil Rights Act relied upon here authorizes actions against individual persons only.

III

Even if, for the sake of argument, it be conceded that the Civil Rights Act authorizes actions against a state, the Court should refrain from granting an injunction against the State of Alabama under the facts here alleged. It may well be that the plaintiff has an appropriate remedy by injunction against individual state officials who deprive other persons of constitutional rights; however, it does not follow that the courts possess similar authority to proceed directly against a sovereignty, or that such power should be exercised if possessed.

The injunctive power of the Courts is the result of historical development. The traditional equitable principles certainly never were extended to reach a government in its sovereign or governmental capacity. Indeed, the courts have rarely entered the "political thicket" by attempting to adjudicate matters involving a state's governmental functions as distinguished from a state's proprietary interest. It would be a departure from our concept of government for a district court to exercise general supervisory control over a state government. It never has been considered a judicial function of the Courts to perform the ordinary duties of an executive branch or administrative department of the government. It is not clear that the Court could enforce the kind of injunction sought here. Whether a

person, resident of and a citizen of Alabama, is entitled to be registered for the purpose of voting is determined solely by weighing his or her qualifications and disqualifications by standards outlined in the Constitution and statutes of Alabama, and the question of alleged unconstitutional discrimination in registration cannot be determined by classes or groups of individuals, as this action attempts to do, but must be determined as to each individual.

It is difficult to see the consequential effect if the Trial Court were required to enjoin the State of Alabama; but among the unfortunate effects which can be foreseen, it is apparent that the Federal Courts would become the Boards of Registrars for each county in the State, taking over the work involved in each individual registration.

The judiciary will not ordinarily encroach upon the other departments of government. Nor will the courts exercise injunctive power to control or direct the executive departments of government which involve the exercise of judgment or discretion.

The courts have repeatedly held that when state officials are acting in an unconstitutional or otherwise illegal manner they are not regarded as acting for the state. It is the offending officials who are subject to being enjoined. That remedy is clear and adequate. The courts should not and need not embark upon the uncharted waters of proceeding directly against a state.

The Federal Courts must be careful to adjudicate, and not legislate, in their legitimate concern to protect against voter racial discrimination.

ARGUMENT

I

DEFENDANTS ROGERS AND LIVINGSTON HAD NO CONNECTION WITH THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA, FOR ANY PURPOSE AT THE TIME OF SUIT

The lower courts determined as a question of mixed fact and local law that Grady Rogers and E. P. Livingston had completely and effectively resigned from the Board of Registrars of Macon County, Alabama, prior to the time suit was filed and that neither had any connection with the Board of Registrars for any purpose at the time suit was filed.

Title 17, Section 22, Code of Alabama 1940, provides the following:

> "The registrars so appointed under this Article may be removed at the will of the appointing board, or a majority of the members thereof, at any time, with or without cause, and without giving their reasons therefor; and if not so removed, the registrars *may* hold office for four years from the time of their appointment and until their successors are appointed." (Emphasis supplied)

The Governor, Auditor and Commissioner of Agriculture and Industries constitute the appointing board under the provisions of Section 21 of said Title 17.

The argument of the United States in the District Court and in the Fifth Circuit Court of Appeals was that the use of the word "may" as used in the above statute is to be construed as "shall", and therefore it is the duty of the registrars to hold office until a successor is appointed.

Stated another way, it is contended by the United States that the resignations of Appellees Livingston and Rogers are not effective until their successors are appointed.

View this case as one may, State law governs the resignations in question and their effective date. *Edwards v. United States*, 103 U. S. 471; *Amy v. City of Watertown*, 130 U. S. 301.

Indeed, the appellant recognizes this rule on page 41 of its brief, then blithely ignores its validity by a specious argument that, although the office of voting registrars is a creature of the Alabama law and Alabama law controls the termination of the powers of that office, yet in some way, the individuals must continue to serve ex officio after official connection has been severed!

A public office established to provide governmental services for a state is created by the State Legislature and can be abolished by the State Legislature. Surely the Legislature can effectively provide for the removal of the officer or the termination of his powers under the state created office. See *Higginbotham v. Baton Rouge*, 306 U. S. 535, 83 L. Ed. 968.

In 1893, by Act of February 21, 1893, page 837, the Legislature of Alabama provided that judges of probate shall superintend the registration of electors in their respective counties. The Governor was then authorized to appoint one competent registrar for each county and a competent person as precinct registrar for each precinct in the respective counties. Each of the persons so appointed "shall hold office for four years or for the unexpired term of their predecessors in office in the event of an appointment to fill a vacancy." Article 2, Chapter 40, Volume 1, Code of Alabama 1896.

By Section 5 of Act No. 480, General Acts of Alabama 1903, page 438, registration was first provided for by a board of three reputable and suitable persons who are also qualified electors resident in the county. They were appointed by the Governor, State Auditor, and Commissioner of Agriculture and Industries, or by a majority of them. It was further provided that the registrars so appointed "shall hold office for four years and until their successors are appointed."

Then again, in the Code of Alabama 1907, it was likewise provided by Section 301 thereof that "The registrars so appointed shall hold office for four years and until their successors are appointed."

By Act No. 78, General and Local Acts of Alabama 1920, page 78, (Special Session) the Legislature changed the prior law from "shall hold office for four years" to "may hold office for four years," and this is the law as it now stands and as it was when this suit was filed. Title 17, Section 22, Code of Alabama 1940, supra.

It is thus shown beyond question that the Legislature did not intend "may hold office for four years" to mean "shall hold office for four years."

The legislative intent is the controlling factor in arriving at the true meaning of any statute. This legislative history shows this intent to be that "may" was not meant to be construed as "shall" as contended by appellant.

The Supreme Court of Alabama expressly rejected a similar contention in regard to this very statute under consideration in *Cooper v. State*, 226 Ala. 288, 147 So. 432.

But even if "may" be construed as "shall", the Appellees Livingston and Rogers under Alabama law had

legally and effectively resigned before this suit was brought.

The following public officers in Alabama *shall hold* their respective offices for the term of four years and until their successors shall be elected and qualified:

1. Governor
2. Lt. Governor
3. Attorney General
4. Auditor
5. Secretary of State
6. Treasurer
7. Superintendent of Education
8. Commissioner of Agriculture and Industries
9. Members of the Public Service Commission
10. Circuit Solicitors
11. Sheriff
12. Coroner
13. County Commissioners
14. County Treasurer
15. Justices of the Peace
16. Constable

The following public officers in Alabama *shall hold* their respective offices for the term of six years, and until their successors shall be elected and qualified:

1. Chief Justice
2. Members of the Supreme Court
3. Judges of the Court of Appeals
4. Circuit Judges
5. Judges of Probate
6. Circuit Court Clerks
7. Judges of Inferior Courts
8. Tax Assessors
9. Tax Collectors

The following are the provisions of Alabama law relating to the terms of office of the above officers. Section 15, Title 41, Code of Alabama 1940:

> "The governor, lieutenant-governor, attorney general, auditor, secretary of state, treasurer, superintendent of education, commissioner of agriculture and industries, the president of the public service commission and two associate public service commissioners, shall hold their respective offices for the term of four years from the time of their installation in office, and until their successors shall be elected and qualified, such installation to take place on the first Monday after the second Tuesday in January next after their election."

Section 17, Title 41, Code of Alabama 1940:

> "Circuit solicitors shall hold office for the term of four years from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified."

Section 18, Title 41, Code of Alabama 1940:

> "The sheriff, one coroner, county commissioners, or members of board of revenue, or boards or courts of like jurisdiction, one county treasurer, when elective, two justices of the peace, and one constable for each election precinct, shall hold their respective offices for the term of four years from the first Monday after the second Tuesday of January next after their election, and until their successors are elected and qualified."

Section 16, Title 41, Code of Alabama 1940:

> "The chief justice of the supreme court and associate justices of said court, the judges of the

court of appeals, circuit judges, judges of probate courts, and clerks of the circuit court; and judges of inferior courts, when not otherwise provided for by law, shall hold their respective offices for the term of six years from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified."

Act No. 113, General Acts 1943, page 115, in pertinent part:

"... the term of office of all county tax assessors shall be for a period of six years and they shall hold office until their successors are elected and qualified ..."

Act No. 114, General Acts 1943, page 115, in pertinent part:

"... the term of office of all county tax collectors shall be for a period of six years, and they shall hold office until their successors are elected and qualified ..."

There is nothing in Alabama law which prohibits the resignations of these public officers even though vacancies are created immediately upon the resignations becoming complete. They are not required to hold their offices until their successors are elected and qualified.

Title 41, Section 160, Code of Alabama 1940, provides that any office in this State is vacated "by his resignation except in such cases as are excepted by law." There are no exceptions as to registrars. This has been the law of Alabama since the first Code of 1852. In full the Statute is as follows:

"How offices are vacated.—Any office in this state is vacated:

By the death of the incumbent.

By his resignation, except in such cases as are excepted by law.

By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed.

By the decision of a competent tribunal declaring his election or appointment void, or his office vacant.

By the act of the legislature abridging his term of office, when the same is not fixed by the constitution.

In such other cases as are or may be declared by law."

No one, except the United States, has ever contended that under Alabama law an office could not be vacated by resignation, and that one resigning had to continue to serve until his successor was elected or appointed.

It is obvious that most of the above named officers perform "Federal duties" as well as State duties.

As far back as 1873, in the case of *State ex rel. Williams v. Fitts*, 49 Ala. 402, the Supreme Court of Alabama ruled that:

> "Except in some rare instances, no person is compelled to hold office. He may retire at his mere will, upon the moment . . . when he transmits an unconditional resignation, which he intends shall reach the officer or authority entitled to receive it, he resigns."

The above case involved the resignation of a county solicitor.

The above rule of law in Alabama was reaffirmed in *State ex rel. Almon v. Fowler*, 160 Ala. 186, 48 So. 985, a 1909 case.

The United States seeks to have this Court believe that the resignations of Livingston and Rogers were in bad faith; this, despite the undisputed evidence in affidavit form to the contrary and despite holdings to the contrary by both the District Court and the Fifth Circuit Court of Appeals.

One statement of fact will suffice. The Appellee Rogers offered himself as a candidate in March, 1958 for the Alabama Legislature in the May Primary of 1958 which was long before the Civil Rights Commission ever entered Alabama. He was nominated in the May Primary and elected as a Member of the Legislature the following November. The organizational Session of the Legislature was in January 1959. He resigned as a registrar on December 10, 1958.

That is what the Solicitor General calls bad faith.

Under the Constitution and laws of Alabama, two offices of profit under this State cannot be held by any person at one and the same time. Section 280, Constitution of Alabama 1901; Title 41, Section 5, Subsection 7, Code of Alabama 1940.

Section 280, supra, provides the following:

> "No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the

peace, constables, notaries public, and commissioner of deeds."

Subsection 7, supra, provides the following:

"No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this state; nor shall any person hold two offices of profit at one and the same time under this state, except notaries public."

And the acceptance of an office of profit by a person already holding another office of profit operates as a vacation of the office first held. *State ex rel. Camp v. Herzberg*, 224 Ala. 636, 141 So. 553.

So viewed in any light, the Appellees Livingston and Rogers effectively and completely resigned on December 10, 1958, and before this suit was brought in the District Court.

In the *Edwards* case, 103 U. S. 471, the Court said:

"But conceding that the law in some of the states is as contended for by the plaintiff in error —and he cites cases to this purpose decided in Alabama, Indiana, California and Nevada and conceding that Justice McLean's decision may have been correct in the particular case before him, the question is: What is the law of Michigan"?

Here the question is: What is the law of Alabama?

This is recognized by Government Counsel when it was stated in their brief filed in the Fifth Circuit Court of Appeals:

"The question therefore is principally one of the proper construction of Alabama law as to the

requirement of registrars to hold office until successors are appointed."

We call to the Court's attention that resignation is not the only reason here by which Rogers and Livingston were separated completely from their former office. In addition to the uncontroverted fact of resignation, the acceptance of other offices automatically vacated the first offices; and the appointing authority had the independent power of removal and exercised it.

We have shown that under Alabama law they do not hold office after their resignation or removal until successors are appointed. This being true, the judgement of the District Court and of the Court of Appeals was absolutely correct and should be affirmed.

There is no case decided by this Court, nor do we believe there ever will be, which holds that notwithstanding state law to the contrary, the resignation of a voting registrar is not effective for federal purposes until his successor has been appointed. That contention is simply one advanced by counsel for appellant under the belief that this Court will accept any kind of argument so long as it may result favorably to prospective Negro voters. We think otherwise.

The United States would have this Court say, in the absence of congressional action, that Livingston and Rogers must serve until their successors are appointed and further that a federal court can supervise their actions in registering or failing to register prospective voters, black or white; but since the only possible jurisdiction arises from "discrimination because of color", presumably the Court could supervise the registration of only the Negro applicants!

None of the cases cited by appellant support any such proposition as contended for by appellant, and its pres-

ent argument was not even thought of or advanced until the case reached this Court.

A moment's reflection brings to mind the chaotic situation which would be created by upholding the appellant's contention. Bear in mind that the remedy here sought under the Civil Rights Act is not punitive or compensatory for past discriminations but injunctive relief to prevent future discriminations. Certainly if the offending officials are not functioning they cannot commit future discriminations. Suppose the appellant's view was imposed upon Rogers and Livingston and they are compelled by a mandatory injunction (the effect of the argument at page 50-56 of appellant's brief): Their second State offices would be threatened because of the Alabama Constitutional prohibition against holding two offices; their past records would not be available for their future use; they would have no office furniture or equipment, and indeed, no building or room in which to perform this forced function. If these physical and functional considerations are not sufficient to demonstrate the complete impracticality of the proposal, then examine the complete governmental confusion engendered. These registrars would no longer have any State authority and would function only by federal direction or compulsion. Would they be able to register white voters as well as Negro voters? (Probably not because any Federal authority is based on racial discrimination.) Would the Alabama constitutional and statutory qualifications pertain, i. e., the age requirements, etc.? Or, would general "equitable" considerations rather than strict statutory voter qualification control? Would the voters so qualified by these registrars performing a "Federal" duty to register Negroes be entitled to vote in state and county elections or only in federal elections? Who would pay

the expenses and per diem for these registrars rendering this enforced service? What happens if one of the registrars is moved by his employer from Alabama to another state? Would he be forced to remain in Alabama to perform this function until some successor is found who is willing to accept such a binding official position? Etc., etc.

At pages 54-56 of appellant's brief, some argument is presented on a purely procedural question (which is raised here for the first time): Was there substantial error in the Court dismissing the complaint without a full trial? We concede that the allegations in the complaint are taken as admitted for the purpose of a motion to dismiss; but the filing of affidavits with the motion to dismiss placed upon the appellant the burden to disclose the merits of his case by counter-affidavit. Moreover, there was no allegation that the resignations were in "bad faith." The closest allegation is found in the Complaint at 12.(e) (R. 5) "From December 1958 to the present, the Registration Board rendered itself inoperative by the purported resignation of its only two members." The Court, with the full participation of all parties, proceeded under Rule of Civil Procedure 12(b) (6) and 56. Both sides presented affidavits. That procedure is customary and proper. *Williams J. Kelly Co. v. R. F. C.* 1 Cir., 172 F. 2d 865; *Cook v. Hirschberg*, 2nd Cir., 258 F. 2d 56; *Geller v. Transamerica*, 53 F. Supp. 625, 629, and many other cases.

As stated by appellant in the petition for a Writ of Certiorari, the principal question in this case is whether the Civil Rights Act of 1957 authorizes the grant of injunctive relief against a state. (Petition for Writ of Certiorari, pages 2 and 5.) It should be so treated by this Court in its future consideration of this case.

II

AN ACTION UNDER THE CIVIL RIGHTS ACT MUST BE AGAINST INDIVIDUAL PERSONS OR OFFICIALS; AND THE STATE OF ALABAMA IS NOT A PROPER PARTY DEFENDANT IN AN ACTION BROUGHT UNDER THE CIVIL RIGHTS ACT OF 1957

Registration is conducted by individual officials. If they are guilty of discrimination, the action can and should be brought against those individuals. This gives ample remedy to petitioner and refutes any idea of urgency or necessity for this procedure and also demonstrates the impropriety or lack of necessity for suing a state in its sovereign capacity, particularly where the state laws directly forbid the discrimination complained of.

The courts from the very beginning of the Civil Rights cases have seen that such legislation must act upon persons; not upon the abstract thing denominated a state. This accomplishes all the legitimate purposes of the statutes and in no wise invades state sovereignty. *Ex Parte, Commonwealth of Virginia (1879)*, 100 U. S. 339, 347; 25 L. Ed. 676, 679.

Furthermore, as is pointed out in the opinions of the Trial Court and Court of Appeals, the Civil Rights Act of 1957 has been sufficiently interpreted by the courts to make it clear that the remedies contemplated by the Civil Rights Act are against "persons" and not against "states".

The complaint shows on its face that this action is brought under the Civil Rights Act of 1957 (P. L. 85-315, 71 Stat. 634, 42 U. S. C., Sec. 1971). A leading case on the subject is *Handy Cafe v. Justices of the Su-*

perior Court of Mass., 248 Fed. 2d 485, Cert. Den. March 10, 1958; 356 U. S. 902, holding that the District Courts of the United States have only such jurisdiction of proceedings instituted under the Civil Rights Act as is there provided. In its opinion, the Court of Appeals, First Circuit, indicated clearly that groups or bodies of officials do not constitute suable legal entities in themselves and ruled that the Civil Rights Act is applicable against individual persons only.

There are a number of other cases dealing with this basic legal proposition of proper parties defendant under the Civil Rights Act. *These cases uniformly hold that the Act is directed against defending persons and not the sources of authority.* No case to the contrary dealing with Civil Rights has been found by us or cited by the appellant.

The following cases clearly support the Trial Judge and Circuit Court of Appeals (cited by the Court of Appeals) in their rulings on this point:

McSwain v. County Board of Education, 104 Supp. 861 (Tenn. 1952) holding that the Civil Rights Act (then cited under Sec. 43, Title 8, USCA; now transferred to Title 42) "operates upon persons, not upon the sources of their power," therefore, the State of Tennessee was not a proper party.

Jerrell L. Graves v. The City of Bolivar, Missouri, 154 F. Supp. 625 (Missouri 1957) holding that the Civil Rights Act extends to "person" acting under color of a statute, ordinance, regulation, custom or usage of a state or territory, who deprives a citizen or other person of a right, privilege, or immunity secured by the Constitution of the United States, and a "person" as used therein

does not encompass a municipal corporation; the motion to dismiss as to the city was sustained.

Hewitt v. City of Jacksonville, 5 Cir., 188 F. 2d 423, Certiorari Denied, 342 U. S. 835, 72 S. Ct. 58, 96 L. Ed. 631, holding that the word "persons" used in the Civil Rights Statute does not include a state or its governmental subdivisions acting in their sovereign, as distinguished from their proprietary, capacity. (Lower Court was held correct in refusing to allow the amendment adding City of Jacksonville as a party defendant.)

Charlton v. City of Hialeah, 188 F. 2d 421 (U. S. Ct. of Appeals, 5th Circuit), holding Congress, by enactment of the Civil Rights Act, did not create liability on the part of a municipality as distinguished from the "person" who committed the acts which deprived a person of his civil rights; that an action under the Civil Rights Act against a Florida city was in effect an action against the State of Florida itself; and "it was not intended by the 14th Amendment and the Civil Rights Statute that all matters formerly within the exclusive cognizance of the states should become matters of national concern. A construction such as sought by the appellant would find a violation of federal rights in every departure from local or state law by local or state officers. Every illegal discrimination by a policeman on the beat would be a state action for the purpose of suit in a federal court."

The above cases, which were referred to in the opinion of the Court of Appeals, can be supplemented by additional decisions showing a similar uniform construction by the Courts of this feature of the Civil Rights Act:

Shvey v. State of Michigan, et al., 106 F. Supp. 32 (Michigan, 952) holds that a municipality is not a "person" subject to liability under the Civil Rights Act. (Motion to dismiss sustained as to State of Michigan and City of Detroit.)

Cobb v. City of Malden, 202 F. 2d 701 (Court of Appeals, First Circuit 1953), holds that the courts are not warranted in reading into the language and purpose of the Civil Rights Act a right of action against a municipality; stating, "At least with regard to the operation of its school system, we think that a municipality is not liable for the conduct of its officials who flout the Constitution."

Agnew v. City of Compton, 239 F. 2d 226, Certiorari Denied, 353 U. S. 959, 77 S. Ct. 868, 1 L. Ed. 2d 910, (Court of Appeals, Ninth Circuit 1957) held that a city acting in its sovereign capacity cannot be held liable under the Civil Rights Act.

Cuiksa v. City of Mansfield (Court of Appeals, Sixth Circuit 1957), 250 F. 2d 700, held that governmental immunity from suit of a municipality performing a governmental function has not been abrogated by the Civil Rights Statute, citing among other authorities, *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 NE 164, 27 ALR 1497 and *Tenney v. Brandhave*, 341 U. S. 367, 71 S. Ct. 783.

More recent cases are:

Egan v. City of Aurora (District Court N.D. Ill. E. D. 1959) 174 F. Supp. 794, Civil Rights case, held that no cause of action was stated against

the City, because of the City's common law immunity.

F. L. Shuttlesworth, et als. v. The City of Birmingham, et al., Civil Action No. 9505. In the United States Court for the Northern District of Alabama, Sou. Div., decided January 27, 1960, (not yet reported) in which the City was dismissed as a party defendant from an action for injunctive and declarative relief, the Court held that "a municipality has been held not to be a 'person' as used in the Civil Rights Act, where it is acting in its sovereign, as distinguished from its proprietary, capacity." The Court also stated: "In any event, the granting or denial of injunctive and declaratory relief rests in the sound discretion of the Court," citing *Cobb v. City of Malden*, 202 F. 2d 701.

This was the settled construction before the Civil Rights Amendment of 1957 was considered and passed; and that clear and definite interpretation was known to Congress.

The Courts have consistently followed the same construction of the Act since passage of the 1957 Amendment as before its passage. It is submitted that legislation would be required to change this settled and recognized construction.

Nowhere in the Government's brief do they explain how their complaint satisfies Paragraph (c) of Section 1971 of the Civil Rights Act, which provides whatever authority the Attorney General has to institute a proceeding for preventive relief. It is there required that it appear that reasonable grounds exist to believe that some person is about to engage in an act or practice which would deprive some other person (specifically

the Negroes mentioned in the complaint) of voting rights. It appears from the face of the complaint that the defendant, State of Alabama, has threatened no action which would discriminate against these Negroes. The complaint shows that the laws of the State of Alabama direct the officials acting as registrars to follow certain procedures which are clearly non-discriminatory. A review of the complaint and the statutes of the State of Alabama referred to therein demonstrates that it cannot be charged that the State of Alabama has participated in, or is about to participate in, any discrimination as to any person's voting rights. The allegations of the complaint make no showing that any of the defendants are intimidating, threatening, or coercing any person for the purpose of interfering with the right of such person to vote. Moreover, the statutory and constitutional provisions recited in the complaint, and of which this Court takes judicial knowledge, specifically negate any charge or allegation to the contrary as to the State of Alabama. It is not shown in any way that these twenty Negroes named, or those situated like them, are in any different situation from anyone else, and there is no way to gain an inference from the complaint that they are threatened with discrimination by the State of Alabama.

A careful reading of the Civil Rights Act shows that the word "person" appears many times. Part IV of the Civil Rights Act of 1957 in paragraph (c) (P. L. 85-315, 71 Stat. 634, 42 U. S. C., Supp. V. (1971(c)) contains whatever authority the Attorney General possesses for instituting suit:

> "(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or

privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

The word "person" means an individual person and does not inferentially include a state: A word is generally given the same meaning wherever it is found in a particular statute. Quoting the applicable portion of the Statute, "whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive *any other person* of any right or privilege" respecting voting. A state of course cannot vote. Obviously, only an individual person possesses the right or privilege secured by Subsection (a) or (b) of the Section, which is the right of an individual person to vote. Therefore, when the word "person" is used throughout the Statute, it means, of necessity, an individual person, and cannot include a state.

As indicative that sovereigns are not included in the word "person", Paragraph (c) distinguishes the United States by providing "In any proceeding hereunder, the United States shall be liable for costs, the same as a private person."

There are no words in the Statute conveying authority to proceed directly against a state. Appellant seeks to construe the Statute in such a way as to include the State as a party defendant. The general law of statutory construction does not support the appellant's position. Generally, neither the Government, whether

federal or state, nor its agencies are considered to be within the purview of a statute, unless an intention to include them is clearly manifested. This general doctrine applies with special force to statutes by which prerogatives of the government involved would be diminished. *82 Corpus Juris Secundum, Statutes, Section 317, page 554.*

This doctrine was recognized by the Trial Court, which used the analogy found in the decision of the Supreme Court of the United States in *United States v. Mine Workers (1947)*, 330 U. S. 258, 275.

The legislative history of the Civil Rights Act does not bear out the contention of the appellant that Congress intended for the Civil Rights Act to operate directly against a state as distinguished from operation against an offending individual or official. At the time Congress amended the Civil Rights Act in 1957, the clear and uniform ruling of the courts that the Act operated only against individual persons was, of course, known to Congress. Congress did not change this feature or aspect of the Civil Rights Act. This, of itself, is an indication of congressional intent.

The intent of Congress is also revealed in the hearings. See the testimony and statements before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-Fifth Congress.

At page 570 of this Civil Rights hearing report, the Honorable Herbert Brownell, Jr., as Attorney General of the United States, testified and traces the history of the Civil Rights Act, and there clearly shows that Section 1971 of the Act applies only to "private persons", "only to those who act 'under color of law', which means public officials, and the activities of private persons."

Again, at page 589, Mr. Brownell testified that it was desired that the laws be amended to permit the Federal Government to seek from the Civil Courts preventive relief in Civil Rights cases, and at the bottom of page 590, he states:

> "Criminal prosecutions, of course, cannot be instituted until after the harm has been actually done, and under the present proposals the Attorney General would be authorized to go to the civil courts for injunctive and other appropriate relief as the cases may require."

Then on page 606, discussing Part 4 of the Bill which was enacted into the law, Mr. Brownell testified, as follows:

> ". . . At the present time, our jurisdiction is limited to commencing criminal proceedings under section 241 and 242, which are the criminal provisions of the civil-rights laws. Under 242, it is necessary that the wrongdoer be a State officer. In other words, that he be acting under color of law. Under section 241, you have to prove a conspiracy. The statute operates only against conspirators, in other words . . ."

> ". . . To repeat, the proposed legislation, which we offer you this morning, would make no change in the Department's jurisdiction in this matter. What it would do is to give the Department civil powers in addition to the existing criminal powers. With these new civil powers, we could reach only the same situations which are now susceptible to action under the sections 242 and 241 . . ."

Could that mean anything other than the clear meaning that the jurisdiction of parties defendant is not enlarged upon? Clearly, the Attorney General of the

United States, at the time of the passage of the Amendment, emphasized himself that the State cannot be made a party. Quoting from the Government's Brief to this Court (page 51) in the case of *U. S. A. v. Raines*, Case No. 64, this term:

> "In the Report of the Judiciary Committee of the House (H. Rep. No. 291, 85th Cong., 1st Sess., pp. 13-15), there is reproduced a letter from the Attorney General to the Speaker of the House . . . In this letter, the Attorney General made this statement:[37]
>
> "The existing civil voting statute (sec. 1971 of Title 42, U. S. C.) declares that all citizens who are otherwise qualified to vote at any election (State or Federal) shall be entitled to exercise their vote without distinction of race or color. *The statute is limited, however, to deprivations of voting rights by State officers or other persons purporting to act under authority of law.* In the interest of proper law enforcement to guarantee to all of our citizens the rights to which they are entitled under the Constitution, I urge consideration by the Congress * * * of three changes.
>
> "First, addition of a section which will prevent anyone from threatening, intimidating, or coercing an individual in the exercise of his right to vote, whether claiming to act under authority of law or not, in any election, general, special, or primary, concerning candidates for Federal office. (Emphasis added)
>
> "As indicated above (p. 47), the interpretation placed upon the proposals by the Attorney General deserves particular consideration, in light of the fact that Administration proposals were here involved.

"[37]H. Rep. No. 291 at p. 15. The letter, dated April 9, 1956, discusses the Administration's 1956 proposals for civil rights legislation. Since the same recommendations were made in 1957 this letter was incorporated into the 1957 reports."

Therefore, the decision of the *Handy case* and other similar cases are properly controlling, and still controlling.

There are other considerations showing that it was never contemplated that proceedings would be brought in the District Courts directly against a state.

Had it been intended that states could be made parties defendant under the Civil Rights Act, Congress would have worded Section 137, Paragraph (d) differently. This is the paragraph conferring jurisdiction on the District Courts; it is well known that the Constitution of the United States in Article III, Section 2, gives the Supreme Court of the United States original jurisdiction (but not necessarily exclusive jurisdiction) in proceedings against states. The wording of this provision would be an attempt to oust the Supreme Court of its concurrent original jurisdiction if states could be made parties, as the Act provides for original jurisdiction in the District Courts only. Obviously, it was never intended that actions under the Civil Rights Act be brought directly against states.

Moreover, the Act speaks of "practices which would deprive any other person of any right or privilege . . .", and the "party aggrieved." The obvious purpose of Paragraph (c) added by the 1957 Amendment was to authorize the Attorney General to institute a civil action for preventive relief for or in behalf of those persons threatened with a deprivation of their constitutional voting rights. To permit such an action directly

against a state would be an attempted evasion of Article XI of the Constitution which prohibits suits by citizens against the states.

It is apparent that the United States has no direct interest in spite of the general wording of the provision of Paragraph (c) of 1971, under which this action is brought. In that connection we refer the Court to the testimony of Mr. Brownell in the Civil Rights hearings before Subcommittee No. 5 in February, 1957, at page 599, where this testimony appears:

> "The Chairman. But it says for the benefit of the real party in interest.
>
> Mr. Brownell. Or for the benefit of the real party in interest.
>
> The Chairman. Suppose the individual brought his own action. Could you intervene in that case under these provisions?
>
> Mr. Brownell. Yes . . ."

And on page 602:

> "Mr. Miller. Would there be any objection of the Department of the inclusion in the bill just a simple provision that where the Attorney General instituted the action in the name or for the benefit of the real party in interest, that it be with his consent?
>
> Mr. Brownell. I would think it might be misleading to do that, . . ."

To clinch the assertion that the real party in interest is not the United States, but certain citizens of the State of Alabama, please examine the wording of Paragraph (d) of Section 1971, which purports to give this Court jurisdiction. There it clearly says that "the party

aggrieved" need not exhaust his administrative or other remedies before suit is brought. "Who is the party aggrieved?" It must of necessity be these complaining witnesses. That being so, this is a suit by the United States for and on behalf of certain individual citizens of the State of Alabama. Then there is no justiciable controversy or actual controversy between the parties. The United States has no proprietary interest or any real interest. The real parties in interest are these citizens. For that reason, this Court should not take jurisdiction of the matter as courts do not entertain suits that are moot as to the parties, or where the parties before the court have no direct interest. Judicial power of courts is always limited to actual controversies by adverse litigants.

Of more importance, it is clear that under the case of *Hans v. State of Louisiana,* 134 U. S. 842, 33 L. Ed. 177, a citizen of a state cannot sue his own state in a district court. Sometimes this is said to be controlled by the 11th Amendment, but at any rate it is settled law that district courts will not take jurisdiction of suits against a state by a citizen of that state. Therefore, it surely follows that, if the real parties in interest, that is, "the aggrieved parties", are citizens of the State of Alabama, Congress did not intend that a state should be sued by a citizen through the United States, only a nominal party, as an evasion device to get around the guarantee of the 11th Amendment granting states immunity from such suits. This further substantiates the view that Congress never intended that a state should be made a party defendant under Civil Rights proceedings.

The public official who denies any other person his constitutional rights is acting personally and not as an agent for the State; particularly so in this instance

where the Alabama law itself expressly forbids any discrimination between applicants for registration. The general law has been settled for years.

When state officials are acting in an unconstitutional or otherwise illegal manner, they are not regarded as acting for the state, either in its sovereign or governmental capacity, and they may be enjoined if the ordinary remedies of law are inadequate. 43 C. J. S., Injunctions, pages 625 and 626.

Injunctive proceedings have never been regarded proper against states as such. 28 Am. Jur. 355; 43 C. J. S. 625, Note 80. It may well be that this doctrine was the result of the State's sovereign position, but in all events the law is clear. Such discrimination as complained of is ultra vires and beyond the scope of the official's authority. Such action is personal, not state action. Quoting from the Opinion of the Supreme Court of the United States in *Ex Parte Young*, 209 U. S. 123, page 159:

> " 'The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding

under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.'"

Not only is this precedent controlling as such, but it was well known to Congress when the Civil Rights Act was first passed, and when it was amended in 1957. Had they intended to include states as parties to actions for preventive relief, they would have said so.

III

EVEN IF THE CIVIL RIGHTS ACT AUTHORIZES AN ACTION AGAINST A STATE, THE COURT SHOULD REFRAIN FROM GRANTING AN INJUNCTION AGAINST THE STATE OF ALABAMA UNDER THE FACTS HERE ALLEGED

Since the Trial Court dismissed the action as to the State of Alabama on other grounds, it was unnecessary for either the Trial Court or the Court of Appeals to go into the further proposition raised below: That the Court should refrain from granting the requested injunction against the State of Alabama, even if the State could be made a party defendant in this proceeding. *It is a serious and extraordinary matter to enjoin a state.* Comity and other principles are involved, in addition to the equitable consideration of the particular allegations of the instant complaint.

First, an injunction against a state is not necessary to restrain threatened unconstitutional wrongdoing on the part of state functionaries, for the injunctive process can be clearly and definitely exercised against the wrongdoer. *United States v. Raines*, decided by this Court this Term on February 29, 1960.

Second, the Alabama laws now forbid discrimination between voter applicants; and, if a registrar engages in acts of discrimination, he would be violating the State's presently existing directives. To put the State under a Federal Court injunction would not aid the State in control of such a wrongdoer who operates beyond his authority and in violation of the State's already existing positive mandate to him. Why embarrass a state in such a manner?

Even if the complaint should state a cause of action upon which relief *could* be granted, *should* it be granted under the circumstances alleged? Should not the Court, exercising its discretionary power, refuse to entertain the action and refuse to grant the relief sought?

The aspect of equity procedure argued here was adverted to in the case of *United States v. Raines*, decided by this Court February 29, 1960. As referred to in Judge Brennan's Opinion (Note 7 on page 9), this is an alternative ground on which the judgment below could be supported; however, in the *Raines case*, Trial Judge Davis specifically declined to dismiss on that ground, and this Court merely observed that there was not discerned any basis in that posture of the case for the contention that the Trial Court abused his discretion in that determination. Also, that injunction proceeding was directed against the allegedly offending individual officers, the "persons" functioning, and did not involve the delicate question of coercing a governmental unit or separate sovereignty.

It is submitted that to grant such an injunction against a state would be to open a Pandora's Box of unforeseeable consequences. To use the words of Justice Douglas from the *U. S. v. Classic* case, 313 U. S. 299, 331, 85 L. ed. 1368, 1386: "We enter perilous territory."

The State of Alabama has already directed its registrars to handle registration for voting in a manner uniform in all cases, with no discrimination between applicants. If the prayer of complainant be granted against Defendant Alabama, what more could the State, as such, do than again direct its registrars by the same statutory provisions?

If complainants seek to have the Federal Courts supervise voter registration, the District Court would be converted into an administrative body, registering applicants in all 67 counties, or reduced to an appeal board supervising the methods, actions, decisions and determinations as to each individual applicant. The prayer seeks to enjoin the State of Alabama, through its officers and agents, from failing or refusing to register twenty Negroes listed by name and others similarly situated. This is, in effect, a prayer for mandamus, or for a mandatory injunction. First, it must be remembered that whether a person, resident of and a citizen of Alabama, is entitled to be registered for the purpose of voting must be determined solely by weighing his or her qualifications and disqualifications by standards outlined in the Constitution and statutes of Alabama; and the question of alleged unconstitutional discrimination in registration cannot be determined by classes or groups of individuals as this case attempts to do, but must be determined as to each individual. Each application must be considered on its individual merits. Second, the injunction prayed for is itself discriminatory, as it seeks (by Paragraph 17(a) (4)) to force or require registration of *Negro* applicants, but is indifferent to the registration of white applicants! Such a concern for one group would appear unconstitutional itself.

Since this "mandatory injunction" is in effect a man-

damus to compel registration, should the Court entertain the mandamus proceeding? Federal District Courts have no general original jurisdiction in mandamus proceedings.

Encyclopedia of Federal Procedure, Third Edition, Volume 15, Section 84.34, citing among others:

Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109

Innes v. Hiatt, 57 F. Supp. 17.

In the latter case the Court said:

> "Moreover, treating the proceedings under the designation of 'injunction', it is in effect an attempt to obtain a mandamus against the Warden of the Penitentiary to change his records, and this Court has heretofore pointed out that where the action is not in aid of this Court's jurisdiction but is an original proceeding in mandamus, the District Court has no jurisdiction. *Hogan v. Hill*, D. C., 9 F. Supp. 975, affirmed 3 Cir. 78 F. 2d. 1017."

That Court is not by itself. For many other cases of like nature, see Courts, Key Number 265, Federal Digest, and especially *Updegraff v. Talbott*, 221 F. 2d 342. That case, written by the late Judge Parker, cogently points out that district courts are without power to grant mandatory injunctions which in effect are writs of mandamus. (op. cit. p. 345).

Ordinarily, injunctions are granted only when the party threatened with injury has no adequate remedy at law: Here we see that the Alabama law provides for appeal, without giving security for costs, within thirty days after denial. Title 17, Section 35, Code of Alabama 1940. It is recognized that the provisions of the

Civil Rights Act, as amended, provide that the district Courts have jurisdiction without regard to whether the party aggrieved shall have exhausted his administrative or other remedies that may be provided by law. However, the point being made here is that "the remedy by injunction, which is a discretionary remedy even when the court has jurisdiction to grant it, ought not to be had to control the state officer in the conduct of his office, even though his conduct may appear wrong, until the remedy to correct him provided by the state has been exhausted. This rule is of special importance between federal courts and state functionaries." (Quotation from *Peay v. Cox*, C. C. A. 5, Judge Sibley, 190 F. 2d 123) That reasoning is all the more apparent when the injunction is sought directly against the state itself! How can it be said that the State is depriving an applicant to register of his rights if the applicant does not follow the corrective process provided by the State law?

Any deprivation or abridgment of an applicant's rights cannot be state action when or if the registrars institute practices of their own and arbitrarily refuse to apply the State law, as is alleged here. How can the State be said to deprive or abridge a person's rights even if as alleged here a registrar takes improper action of arbitrary discrimination in violation of the State laws, and the person aggrieved does not avail himself of the corrective remedies the State has provided?

Any discrimination between applicants for registration is in opposition to the plain prohibitions of the State law; such a practice by a registrar cannot be deemed the constitutional equivalent of denial or abridgment by the State; all the more so, when the State has not been given an opportunity to correct the alleged arbitrary and discriminatory conduct, although

it afforded a remedy for any person who is really seeking to register a vote. Such discrimination alleged is wholly without any authority from the State. This is not merely a matter of exhaustion of remedies. The question is: Has the State deprived or abridged constitutional rights, and should an injunction be directed against the State?

The Court's inherent discretion cannot be eliminated by the mere grant of jurisdiction to a district court. The recognized equitable principles still control.

Of course, the Court can exercise this discretion upon a reading of the complaint as well as after hearing evidence to support the complaint.

Congress cannot expect the courts to break with historic principles of equity in the enforcement of equitable rights. *Holmberg v. Ambrecht*, 327 U. S. 582.

> "Discretionary refusal to exercise equitable power under the Civil Rights Act (of 1870, 1871) to interfere with State criminal prosecution is one of the devices sanctioned for preserving the proper balance between the State and Federal Government in law enforcement. 8 U. S. C. A., Sec. 42."
>
> *Stefanelli v. Minard*, 342 U. S. 117, 72 S. Ct. 118 (H. N. 7)

Because the applicants have the right to appeal, it is safe to say "no irreparable injury, clear and imminent" is threatened. And, if it be asserted that registration is not being conducted in Macon County during the time the Board is vacant, can it be said that Negro applicants are any worse off than white applicants? Besides, it appears that a new Board may be appointed at any time. Or, as the District Judge and the Court of

Appeals observed, the remedy lies in appropriate action to compel the filling of the vacancies rather than perverting the judicial processes (R. 107).

Where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.

To issue an injunction in this instance amounts to a mandate that the registrars register Negroes as such. This basic premise must be remembered: This suit or action is founded upon the XV Amendment to the Constitution of the United States, which is prohibitory in character and *grants or provides no voting rights.* It simply provides that such voting rights as otherwise exist shall not be abridged by a state on account of race or color.

"Article XV gives no affirmative right to a colored man to vote."

Ex Parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274, 278.

Even Article I of the Constitution relating to choosing U. S. Representatives does not authorize *Congress to legislate on voter qualifications,* and Congress has passed no law under the authority of Article I, Section 4 and Section 8, regulating voter registration. Therefore, the Federal Judiciary cannot create voting rights or voter registration rules and regulations by an extension of the Civil Rights Statute, admittedly founded upon Amendment XV. To sustain the Government's contention would in effect register all Negro applicants because they are Negroes, qualified under the Alabama statutes or not.

As the First Circuit Court of Appeals decreed in *Cobb v. City of Malden (1953),* 202 F. 2d 701, 703,

704, even if a city (exercising a state function) were held liable for the wrongs of its officials, a federal court should deny injunctive relief in the proper exercise of its discretion. In that case, the Trial Judge dismissed the complaint against the sovereign respondent, apparently without a further hearing or proof (as was done in the instant case). The Court set out many instances where federal courts declined to exercise jurisdiction to enforce rights arising under state laws, because of considerations of policy, etc. Certainly an injunction against another sovereignty would work a public embarrassment!

The District Court in its opinion in *Egan v. City of Aurora* (U. S. District Court, N. D. Illinois, E. D. 1959), collects numerous authorities in this field of "delicate federal-state relationship." Quoting therefrom:

> "It is likewise apparent that federal courts cannot be so overzealous in their desire to protect individual rights from State abuse that they unjustifiably deprive the State of their inherent sovereignty also protected by the United States Constitution. For these reasons, the federal courts, in applying the Civil Rights Acts, have been consistently solicitous of 'delicate state-federal relationships'. *Francis v. Lyman* 1 Cir., 216 F. 2d 583, 588 . . . *Screws v. United States*, 325 U. S. 91, 108, 109; 65 S. Ct. 1031, 1039 . . ." (Emphasis supplied)

Other cases are cited.

In this proposition, it is not simply a question of the power of the federal courts to act in these areas, but rather the delicate question of the proper use of such power.

CONCLUSION

The carefully prepared opinions of the Trial Court and the Circuit Court of Appeals are sound.

It appears that the appellant seeks to have this Court legislate, rather than review the issues of a litigated case.

The judgment of the Court of Appeals Fifth Circuit, upholding the decision of the District Court, should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, MacDonald Gallion, Attorney General of Alabama certify that on the ..... day of March, 1960, I mailed copies of the foregoing brief to the Attorney General and the Solicitor General of the United States, respectively, at the Department of Justice Building, Washington, D. C.

.....

MacDONALD GALLION
Attorney General of Alabama

APPENDIX

Amendment No. XCI, Constitution of Alabama 1901
Voters' Qualification Amendment.

"Section 181. The following persons, and no others, who, if they are citizens of the United States over the age of twenty-one years and have the qualifications as to residence prescribed in section 178 of this article, shall be qualified to register as electors provided they shall not be disqualified under section 182 of this constitution: those who can read and write any article of the constitution of the United States in the English language which may be submitted to them by the board of registrars, provided, however, that no persons shall be entitled to register as electors except those who are of good character and who embrace the duties and obligations of citizenship under the constitution of the United States and under the constitution of the state of Alabama, and provided, further, that in order to aid the members of the boards of registrars, who are hereby constituted and declared to be judicial officers, to judicially determine if applicants to register have the qualifications hereinabove set out, each applicant shall be furnished by the board of registrars a written questionnaire, which shall be uniform in all cases with no discrimination as between applicants, the form and contents of which questionnaire shall be prescribed by the supreme court of Alabama and be filed by such court with the secretary of state of the state of Alabama, which questionnaire shall be so worded that the answers thereto will place before the boards of registrars information necessary or proper to aid them to pass upon the qualification of each applicant. Such questionnaire shall be answered in writing by the applicant, in the presence of the board without assistance, and there shall be incorporated in such answer an oath

to support and defend the constitution of the United States and the constitution of the state of Alabama and a statement in such oath by the applicant disavowing belief in or affiliation at any time with any group or party which advocated the overthrow of the government of the United States or the state of Alabama by unlawful means, which answers and oath shall be duly signed and sworn to by the applicant before a member of the county board of registrars. Such questionnaire and the written answers of the applicant thereto shall be filed with the records of the respective boards of registrars. The board may receive information respecting the applicant and the truthfulness of any information furnished by him. Those persons who have registered as electors under the Alabama constitution of 1901 shall not be required to register again. Provided, further, that if solely because of physical handicaps the applicant is unable to read or write, then he shall be exempt from the above stated requirements which he is unable to meet because of such physical handicap, and in such cases a member of the board of registrars shall read to the applicant the questionnaire and oaths herein provided for and the applicant's answers thereto shall be written down by such board member, and the applicant shall be registered as a voter if he meets all other requirements herein set out."

Section 178, Constitution of Alabama 1901

"To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes

due from him for the two calendar years next preceding. Provided, that any elector who, within three months next preceding the date of the election at which he offers to vote has removed from one precinct or ward to another precinct or ward in the same county, incorporated town, or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal."

Section 182, Constitution of Alabama 1901

"The following persons shall be disqualified both from registering, and from voting, namely:

"All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

REGISTRATION

Title 17, Section 26, Code of Alabama 1940, as amended.

"Board of registrars to hold fixed meeting and give notice thereof.—The board of registrars in each county shall visit each precinct at least once and oftener if necessary between October first and December thirty-first, 1939, and each two years thereafter, to make a complete registration of all persons entitled to register, and shall remain there at least one half a day. They shall give at least twenty days' notice of the time when, and the place in the precinct where they will attend to register applicants for registration, by bills posted at three or more public places in each election precinct, and by advertisement once a week for three successive weeks in a newspaper, if there be one published in the county. Upon failure to give such notice or to attend any appointment made by them in any precinct, they shall, after like notice, fill new appointments therein. The time consumed by the board in completing such registration shall not exceed thirty working days in any county, except that in counties having more than three hundred thousand population as shown by the last preceding census, the time shall not exceed seventy-five working days. The board of registrars in each county shall meet at the courthouse on the third Monday in January, 1940, and each two years thereafter and shall remain in session ten working days for the registration of voters."

SPECIAL REGISTRATION

Title 17, Section 27, Code of Alabama 1940, as amended:

"Special registration.—In addition to the regular registration provided in this article, the courts of county commissioners, boards of revenue, county commissioners, or other courts of like jurisdiction of the several counties may make an order requiring the books of registration to be opened for ten working days during the month of January, 1941, and each two years thereafter, and it shall be mandatory for the board of registrars to meet on the first Monday in July, 1940, and each two years thereafter, and remain in session at each of said meetings five days for the purpose of registering voters, and the board shall meet on the first Monday in July, 1941, and each two years thereafter and shall remain in session at each of said meetings five days for the purpose of registering persons entitled to register, except that in counties having a population of more than one hundred and ten thousand and not more than one hundred and fifty thousand according to the last or any subsequent federal census, this section shall not apply, and except that in counties having more than one hundred and fifty thousand population, as shown by the last or any subsequent federal census, it shall be mandatory for the board of registrars in said counties having more than one hundred and fifty thousand population, as shown by the last or any subsequent federal census, in addition to the meetings provided for in section 26 of this title, to meet as follows and for the following purposes: The board shall meet on the second Monday in April, the fourth Monday in June, the first Monday in August, the first Monday in October and the first Monday in December, 1940, and each two years thereafter, and shall remain in ses-

sion at each of said meetings for ten days for the purpose of registering persons entitled to register; the board shall meet on the first Monday in February, the first Monday in April, the first Monday in June and the first Monday in August, 1941, and each two years thereafter, and shall remain in session at each of said meetings for ten days for the purpose of registering persons entitled to register. Any voters who may become qualified after a qualified voting list has been made and published as now provided for by law during even numbered years may be added to the list of qualified voters by a supplementary list or lists without making a complete new list of qualified voters."

ADDITIONAL REGISTRATION

Act No. 346, General Acts of Alabama, 1945, page 563 in pertinent part provides as follows:

"That the Board of Registrars of every county of the State of Alabama shall be in session at the court house, or one of the court houses, of their county on the first and third Mondays in each month for the purpose of registering all persons in the armed forces of the United States, Merchant Marine, Red Cross, and other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the State of Alabama to register."

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JAMES R. BROWNING, Clerk

No. 398

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER,

v.

STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON QUESTIONS TO BE ARGUED ORALLY

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 398

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO MOTION TO RETAX COSTS

The general rule as to costs in government cases is stated in Rule 57(5) of the Revised Rules of this Court: "No costs shall be allowed in this court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court." The Civil Rights Act of 1957 provides (42 U.S.C. 1971(c)) that "In any proceeding hereunder the United States shall be liable for costs the same as a private person." The statute does not, however, alter the general rule denying allowance of costs *for* the United States.

In this case the only costs incurred by the Government were for printing the record, in the amount of $618.26. Following established practice, the Clerk did

not charge the Government fees under Rule 52 for docketing the case, preparing the record for the printer, etc. We believe that this was correct and that 42 U.S.C. 1971(c) does not call for any alteration of the Clerk's practice in this respect. See 28 U.S.C. 1911.

Similarly, as to the item of $618.26 expended by the Government for printing the record, 42 U.S.C. 1971(c) does not require that civil rights cases be treated differently from other classes of litigation in which the Government is the successful petitioner in this Court. In this respect, also, we do not believe that the general rule denying costs to the United States has been or should be changed.

Accordingly, respondents' motion to retax costs is based upon the mistaken apprehension that, unless this Court orders otherwise, costs will be taxed to them. The motion should therefore be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JUNE 1960.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

NO. 398

UNITED STATES OF AMERICA, Petitioner
v.
STATE OF ALABAMA, et al., Defendants

DEFENDANTS' PETITION FOR REHEARING AND MOTION TO RETAX COSTS

The defendants hereby petition the Court for a rehearing of this cause and reconsideration of the opinion and judgment rendered on May 16, 1960.

Also incorporated herein is a Motion to Retax the Costs.

MOTION TO RETAX COSTS

Under Rule 57 of the Supreme Court, where a judgment is vacated, costs shall be allowed petitioner, unless otherwise ordered by the court.

The Civil Rights Act of 1957, as amended, provides that in any proceeding such as the one here, the United States shall be liable for costs the same as a private person. 42 U. S. C., Section 1971 (c).

Without further order of this Court, it appears that the Defendants will be taxed with all the costs accruing to date in the case, even though the Defendants have been the successful parties to all the *litigated* controversy.

It is particularly unfair to tax Defendants with all the costs in view of the Petitioner's action in the Su-

preme Court which had the effect of affirming the dismissal of Defendants Rogers and Livingston. And, even regarding the Defendant State of Alabama, although it is still in the case, it appears unreasonable to tax it with the costs up to this point.

We do not believe the Writ of Certiorari would have ever been granted in this case had the only question been the right to sue the defendants Rogers and Livingston who had resigned before suit was brought. We regard the opinion and judgment of the Court as a partial vacation of the judgments of the Court of appeals and the District Court, for the United States is only authorized to proceed further against the defendant State of Alabama.

The defendants Rogers and Livingston are for all intents and purposes the successful parties as to their part of the case.

They should not be taxed with any costs, but the same should be taxed against the United States. The Civil Rights Act of 1960 has no bearing on the question of the legal right to sue them after they had resigned and had been removed from office.

As to the State of Alabama, it would also have been the successful party had it not been for an Act of Congress passed after two courts had ruled in its favor and just before the case was considered by this Court.

Under the circumstances we respectfully move the Court to make some equitable order relative to the taxation of costs.

It may be, and we are not clear on this point, that Rule 57(5) may govern, which says that "No costs shall be allowed in this Court either for or against the United States . . . except where specially authorized by statute and directed by the Court."

PETITION FOR REHEARING

On oral argument defendants' counsel stated the Memorandum of the United States had been served on Sunday afternoon before the argument the next day.

Although we had properly considered the 1960 Civil Rights Act, believing it unconstitutional as to the states, we had no time within which to properly evaluate the Memorandum.

The 1960 legislation amends 42 U. S. C. 1971(c) by adding certain language, a part of which is ". . . if, prior to the institution of such proceedings, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceedings may be instituted against the state."

First, the United States has contended in this very law suit that the defendant officials had not resigned or been relieved of office. Unless the judgments of the lower courts are vacated in part only, as we have said is the case, the United State must now reverse its position and agree with the defendant officials that they had effectively resigned, or been removed from office in order to come within the quoted part of said Section (c).

Second, since this case was argued, we call the Court's attention to the fact that two registrars have been appointed, a majority of the Board, in Macon County, Alabama, and have accepted their positions.

Third, the said Subsection (c) relates to parties who may be joined when the suit is instituted. It does not relate to a suit filed against a party who could not legally be sued when the suit was instituted. To say that a state may be sued now under the 1960 Act is entirely different from saying that a suit improperly filed may now be continued by virtue of the 1960 Act.

In short, it is our position that if any suit may now be maintained against a state, it must be through an entirely new suit. Such will avoid delay instead of further delay as claimed by the United States.

The Attorney General of the United States in explaining Section (c), as amended, said, "Inclusion of the provision in the Bill is merely to clarify the authority which exists under the 1957 Act, since a question has been raised concerning the authority in the case of *United States v. Alabama.* This provision merely reaffirms in explicit terms the authority granted by the 1957 Act." Statement dated March 28, 1960, before Senate Judiciary Committee, 86th Congress, Second Session.

At that very moment, as the Attorney General knew, the law was that a state could not be sued. It had been so decided by the District Court and the Court of Appeals. These decisions, until reversed, were binding upon him and the United States in the Fifth Circuit.

The Solicitor General then uses the testimony of Mr. Rogers to show the legislative history of the amendment to Subsection (c). It would have been more accurate to have stated the facts as they existed to the Committee and to have not argued the legislative history in view of the Judicial History to the contrary.

As to the State of Alabama, another indication that if suable at all, it must be by a new suit.

It is respectfully requested therefore that this application for rehearing be granted.

Respectfully submitted,

MacDONALD GALLION
Attorney General
State of Alabama

NICHOLAS S. HARE
Assistant Attorney General
State of Alabama

GORDON MADISON
Assistant Attorney General
State of Alabama

STATE CAPITOL
MONTGOMERY, ALABAMA

For All Defendants

LAWRENCE K. ANDREWS
Union Springs, Alabama

Of Counsel for Defendants
GRADY ROGERS and
E. P. LIVINGSTON

I, MacDonald Gallion, as Attorney General of the State of Alabama, certify that on the ___ day of June, 1960, I mailed copies of the foregoing Petition for Rehearing and Motion to Retax Costs to the Solicitor General of the United States at the Department of Justice Building, Washington, D. C., and that said Petition and Motion are filed in good faith, and not for delay.

MacDONALD GALLION
Attorney General of Alabama

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 398

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

I

In our principal brief we argued (pp. 18–40) that the lower courts were in error in holding that the Civil Rights Act of 1957 does not permit suit against a state. Since the filing of that brief, the Civil Rights Act of 1960, amending the 1957 Act, has been passed by Congress and is now before the President. If enacted into law, it will conclusively settle the main statutory problem involved. While we believe that the 1957 Act in its unamended form authorized suits against a state—and this view is supported by the legislative history of the 1960 amendment—the latter would render unnecessary further consideration of the original 1957 Act, and respondents' contentions concerning it.

The 1960 legislation amends 42 U.S.C. 1971(c) by adding the following language:

> Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

This provision makes it perfectly plain that a state is a proper party defendant in a suit under Section 1971(c). Moreover, the legislative history of the 1960 amendment shows clearly that the purpose of the amendment was not to change existing law but merely to express what was deemed to be the law under the earlier statute. See Hearings before the Senate Committee on Rules and Administration, 86th Cong., 2d Sess., p. 338 (testimony of Attorney General Rogers);[1]

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[1] Attorney General Rogers. "* * * The bill has a second provision applicable to voting rights cases: It would provide that in any such case where State officials charged with the discrimination involved have resigned or have been relieved of their offices and no successors have taken their places, the case may be instituted or continued against the State itself.

"The purpose of this provision is merely precautionary because in a case now before the courts, the Department of Justice has taken the position that existing law permits such litigation."

Hearings before the House Committee on the Judiciary, 86th Cong., 2d Sess., p. 34 (testimony of Deputy Attorney General Walsh).[2] Thus, the new statute would remove any doubt as to the amenability of the state to suit under Section 1971(c).

The propriety of a disposition of this case on the basis of the 1960 amendment is clear. The injunction sought by the Government has not yet issued, and therefore any injunction which will issue will be prospective in character. Since injunction actions involve no problem of retroactivity, intervening statutory changes may be taken into account and the decision based on the state of the law at the time of judgment. *Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 87; *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 464; *American Foundries* v. *Tri-City Council*, 257 U.S. 184, 201; *Hines* v. *Davidowitz*, 312 U.S. 52.[3]

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[2] "Mr. WALSH. There is a case now pending before the Supreme Court that deals with that problem in Alabama, *United States* v. *Alabama*. The practice where a State officer is the person who is responsible, or who is participating in this pattern or practice of discrimination, would be the practice of the Department of Justice to sue the State as one of the parties to the lawsuit. So the State would always be present as a party, and the attorney general of the State would be served with all the processes, as well as the State registrar.

"One of the provisions of this bill——

"Mr. WILLIS. The very last one.

"Mr. WALSH. Expressly gives that privilege, although we think that we already have that under existing law."

[3] Nor does it matter that the facts on which the injunction would be based occurred before the enactment of the new statute. See *Reynolds* v. *United States*, 292 U.S. 443, 449; *Cox* v. *Hart*, 260 U.S. 427, 435.

There is no need or justification for returning the case to the district court for consideration of the 1960 amendment. The 1960 amendment in terms authorizes suit against a state, and poses no factual or other problems within the peculiar competency of the district court. Cf. *Hines* v. *Davidowitz*, *supra*. The complaint in the instant case was filed on February 5, 1959, and still only the stage of preliminary motions has been reached. The rights involved are fundamental. To return the case to the district court for its consideration of the application of the 1960 amendment would serve no useful purpose and could cause further delay.

For these reasons, we urge that the Court dispose of this case by holding that, since the 1960 Act (upon enactment into law) clearly authorizes suit against the respondent state, the case should be remanded to the district court with directions to overrule the motion to dismiss the state as a party defendant.

II

The 1960 Act provides for the appointment of voting referees in implementation of a decree where a pattern or practice of racial discrimination has been found.[4] With this power available to the district court, there would appear to be no need at present for continuing to hold the individual respondents in the case if the state remains as a defendant in the case. Accordingly, if the Court should dispose of the case as proposed above, the Government would have no

[4] The pertinent portion of the Act is printed in the Appendix, pp. 6–10.

objection to the dismissal of respondents Rogers and Livingston as defendants.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JOSEPH M. F. RYAN, JR.,
Acting Assistant Attorney General.

HAROLD H. GREENE,
D. ROBERT OWEN,
Attorneys.

APRIL 1960.

APPENDIX

The Civil Rights Act of 1960 provides in pertinent part:

TITLE VI

SEC. 601. That section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), is amended as follows:

(a) Add the following as subsection (e) and designate the present subsection (e) as subsection "(f)":

"In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for

which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

"Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

"An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

"The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by Revised Statutes, section 1757; (5 U.S.C. 16) to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte at such times and places as

the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

"Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the

basis of answers included in the report of the voting referee.

"The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

"Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: *Provided, however,* That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

"When used in the subsection, the word 'vote' includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having

such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words 'affected area' shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a); and the words 'qualified under State law' shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist."

(b) Add the following sentence at the end of subsection (c):

"Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

U.S. GOVERNMENT PRINTING OFFICE: 1966